Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2013

Leadership is a behavior, not a position

CASE LAW UPDATES THIRD QUARTER

John W. Bizzack, Ph.D.
Commissioner

The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 515 - ROBBERY

Kidd v. Com., 2013 WL 4680428 (Ky. 2013)

FACTS: On the day in question, Bruenemann stopped at a store in Erlanger. Kidd "confronted her, threatened her with a knife, and demanded that she surrender her purse and the keys to her car." She handed them over and then called 911 as he sped away. Officer Miles (Erlanger PD) intercepted the vehicle and short chase ensued. Kidd stopped and tried to run, but he was quickly captured by the officer. Kidd was in possession of the victim's credit cards and cell phone. A knife was found in the stolen car which Bruenemann denied owning.

Kidd was told that he was being charged with Robbery, but he denied having "held a knife" to the victim. He admitted taking the vehicle, however. Kidd was indicted on charges of Robbery 1st, Fleeing and Evading 1st and PFO. Kidd was convicted and appealed.

ISSUE: Is testimony that a robber had a knife (even though none was found in their actual possession) enough to justify Robbery 1st?

HOLDING: Yes

DISCUSSION: Kidd argued that there was insufficient evidence that he was, in fact, armed with a deadly weapon (or threatened the use of a dangerous instrument) at the time of the crime. The Court agreed that he denied it and that surveillance video from just before the robbery showed nothing in his hands. However, it noted that the victim specifically testified that the robber had a knife and another witness testified that the victim "exclaimed that a man with a knife had robbed her." Further, a knife was found in her vehicle. The Court agreed that the evidence supported a verdict that indicated he had the knife.

With respect to the Fleeing and Evading charge, Kidd argued that the prosecution failed to prove that his flight presented a "substantial risk of serious physical injury or death to any person or property." Looking at KRS 520.095, the Court looked to the evidence admitted that indicated he "drove at excessive speeds in a reckless and dangerous manner, that he veered unsafely across lanes of traffic," and that "other drivers were forced to pull off the road in order to avoid a possible collision." As such, the Court upheld that charge as well. Finally, the Court agreed that the admission of two brief surveillance clips – along with 30 still photos from those films – were properly admitted and not "prosecutorial overkill."

The Court also upheld a decision that a juror who was seen closing her eyes was properly examined by the court (she said she was sensitive to the lighting in the courtroom but was paying attention) was properly allowed to stay on the jury.

Kidd's convictions were affirmed.

PENAL CODE - KRS 520 – RESISTING ARREST

Perdue v. Com., Ky. App. 2013

FACTS: On June 6, 2011, Officers Hart and McAllister (Lexington PD) attempted to pick up Perdue on a warrant. A child answered the knock and directed the officers to a back bedroom. Perdue, in bed, was told to get up and get dressed. He asked if he could take a pair of long underwear with him. Officer Hart chose not to handcuff him inside, in front of the child, and Perdue agreed to go voluntarily.

At the cruiser, Officer Hart explained he needed to handcuff Perdue. Before he searched Perdue, he noted that the long underwear had a large safety pin attached and told Perdue that he would need to keep them in the front. "Perdue because agitated and disruptive," cursing and trying to head-butt Hart. Hart was slightly injured. At the jail, where Perdue continued to fight, officers found a glass crack pipe with residue in Perdue's pocket.

As a result of his behavior, which took place in front of his son, Perdue was charged with Disorderly Conduct and Resisting Arrest, along with the warrant charge and Possession of Drug Paraphernalia and Promoting Contraband. He was convicted of most of the charges.

Perdue appealed.

ISSUE: May conduct during the course of an arrest, even after the subject is handcuffed, justify a Resisting Arrest charge?

HOLDING: Yes

DISCUSSION: Perdue first challenged the Resisting Arrest charge, claiming that he was already under arrest when "he went into a rage." Looking to KRS 520.090(1), the Court found no Kentucky law on point. The Court looked at other, similar, state laws and agreed that "'effecting an arrest' is a process that does not necessarily end when a defendant has been handcuffed." As such, the arrest was not yet completed when "Perdue became enraged and began kicking and yelling."

With respect to the Disorderly Conduct charge, Perdue argued that his mother's home, where the arrest occurred, was not a public place. The Court noted that the instruction narrowed the location of his crime to the street, specifically, around the cruiser, for the jury. (The trial court specifically excluded the detention center.) Further, it dismissed

the argument that because Perdue argued that no one was nearby, his actions did not meet the statute, noting that all that was required was that his actions would be "likely to affect a substantial group of persons."

Perdue's convictions were affirmed.

PENAL CODE - KRS 520 - FLEEING & EVADING

McCleery v. Com., 410 S.W.3d 597 (Ky. 2013)

FACTS: On November 28, 2011, Ball went to the trailer occupied by her son, Justin. A neighbor had told her there was a strange car parked there. She called her son and asked if he knew anyone with such a vehicle, which he denied. She honked her horn and a man emerged from behind the trailer. He told her he was "Thomas" and was "looking for guns." He got into the strange vehicle as Ball called 911. She later identified McCleery in a photo array as the man she'd seen.

Deputy Gilpin (Breckinridge County SO) arrived and located the vehicle. He tried to stop it, but the vehicle took off, speeding and ran several stop signs. It was a rainy morning and traffic was heavy. After a mile or so, the vehicle pulled into a circular drive and the passenger jumped out and ran. Gilpin continued following the vehicle and ultimately, it stopped. The driver Darcy, consented to a search of the vehicle and a shotgun, a rifle, ammunition and a paint can (taken from the trailer) containing money was found. Darcy admitted he'd been at the trailer.

Deputy Henley got a call about a man who "had recently emerged from the woods near the caller's home." He had given the man a ride and told the deputy where he'd dropped him off. The deputy found McCleery at the location and placed him in custody as well. Both men were indicted. McCleery was convicted of Burglary, Theft, Fleeing and Evading 1st and PFO. He appealed.

ISSUE: Is proof that someone was actually at risk needed for a Fleeing and Evading charge?

HOLDING: No

DISCUSSION: McCleery argued that there was no proof that anyone had been injured or killed during the flight, or that anyone was even put at substantial risk – or more importantly, that he was complicit in Darcy's decision to flee the scene. Although the Court agreed that their actions did not rise to the same level as other cases of precedent, they did speed and run stop signs, Deputy Gilpin did testify that the traffic was heavy at the time and that a school and shopping center were nearby. This was enough to satisfy the risk element.[1]

[1] See Lawson v. Com., 85 S.W.3d 571 (Ky. 2002).

The Court agreed there was no evidence that McCleery was driving the vehicle, but looked at the situation as whether he was complicit in Darcy's action. The 'Court noted that they were "acting in concert" in the burglary and he got into the vehicle voluntarily. As such , it was reasonable for the jury to infer that McCleery was working with Darcy and may have even counseled him, during the flight, as to what to do. Once he got out, McCleery fled rather than turning himself in immediately.

McCleery's conviction was affirmed.

DUI

Com. v. Ratliff, 2013 WL 4710330 (Ky. App. 2013)

FACTS: On May 8, 2011, Ratliff was arrested for DUI. Officer Fey (Louisville Metro PD) responded to a call of a man down and discovered Ratliff passed out in his vehicle at the Dairy Queen. The car was running and the headlights were on. Officer Fey opened the door, woke up Ratliff, and reached across to turn off the car and the lights. Ratliff was wearing his seat belt. The officer "detected a strong odor of alcohol coming from Ratliff," who, however denied having been drinking. He did state he'd been at the track (some distance away) that day. He refused any FSTs or a PBT, stating "he was not driving." The incident was recorded.

Ratliffe moved prior to the trial for dismissal, arguing the officer did not have probable cause to arrest him for DUI. The District Court, relying on Wells v. Com.,[2] granted the motion, finding that he had not been operating the vehicle. The Commonwealth appealed the dismissal to the Circuit Court, which was denied. It appealed to the Kentucky Court of Appeals.

ISSUE: Does finding an impaired driver in a running vehicle in an empty, closed parking lot justify a DUI arrest?

HOLDING: Yes

DISCUSSION: The Court looked to Maryland v. Pringle to determine if probable cause existed, noting that "to determine whether an officer had probable cause to arrest an individual, [the Court must] examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause."[3] Using White v. Com., the Court agreed that "probable cause to arrest someone for violating KRS 189A.010 must exist and must be known by the arresting officer at the time of the arrest."[4] Although White used the Wells factors to determine whether a subject's "conduct constitutes 'operating' or being 'in physical control' of a motor vehicle," the factors are not exclusive for the

[2] 709 S.W.2d 847 (Ky. App. 1986).
[3] 540 U.S. 366 (2003).
[4] 132 S.W.3d 877 (Ky. App. 2003).

"resolving the issue of probable cause." Instead, the Court must "consider the totality of the circumstances." Further,

> In the case, the Court noted that Ratliff was asleep, but that the vehicle was running and the lights were on. He had been at the location for only about 20 minutes, was "parked across several parking spots at a closed restaurant and he was wearing a seat belt. As such, "these facts address the intent of the driver, the location of the vehicle and circumstances as to how it arrived at it[sic] location." The court found it "difficult to discern a reason for wearing a seat belt other than to guard against injury **while operating a motor vehicle**." The court agreed that someone had to have driven the vehicle to the location, and that it was reasonable to believe that it was Ratliff who had done so.

The Court agreed that the arrest was made with probable cause and reversed the District Court's decision. The case was remanded for further proceedings.

SEARCH & SEIZURE – WARRANT

White v. Com., 2013 WL 5046872 (Ky. App. 2013)

FACTS: On November 29, 2011, Troopers Eiserman and Eversole (KSP) went to a Wolfe County home to arrest Gabbard. They found Gabbard's vehicle at the location so they proceeded onto the property. They found Wilson outside. White was inside but stepped out when he heard the troopers approach. White told the troopers that Gabbard was no longer there. Trooper Eversole told White that he detected a strong chemical odor that he believed suggested methamphetamine manufacturing; he also spotted several propane tanks. He asked for permission to search, which White declined. "White began walking backwards, leading Eversole to believed[sic] he would run, so Eversole detained White and informed him that he was going to seek a search warrant."

Trooper Eversole left to get the warrant, leaving Trooper Eiserman at the property.

The warrant, subsequent issued, read:

> *While speaking with subjects at residence, affiant could smell a strong odor commonly associated with manufacturing of meth. Affiant has had training in this area and has actual prior experience in meth related cases. Affiant has smelled same odor during prior incidents and it has later been confirmed to him that smell was related to meth production. Upon questioning individuals at residence, they denied drugs or paraphernalia in the residence, however affiant observed propane tanks in the area as well, which further indicated meth production.*

Evidence found during the search lead to White's arrest for manufacturing methamphetamine and related offenses. White moved for suppression of the warrant and was denied. He took a conditional guilty plea and appealed.

ISSUE: Must an affidavit be sufficiently specific to justify a warrant?

HOLDING: Yes

DISCUSSION: The court noted that the trooper's affidavit was sufficiently specific and corroborated so as to support the search warrant. The Court upheld White's plea.

SEARCH & SEIZURE – CONSENT

Walker v. Com., 2013 WL 5305770 (Ky. App. 2013)

FACTS: On January 1, 2011, Officer Leddy (Lexington PD) responded to an anonymous tip that there was a methamphetamine lab at Walker's apartment. When he arrived, Walker answered the door and said "they left." Unclear as to what she meant, the officer asked and was told that "the people who had been involved in the disturbance inside her apartment had left." He again said "that he did not know what she meant and requested permission to enter the apartment in order to confirm that everyone inside was alright." She allowed him to enter. As soon as he did so, he spotted Smith, who suddenly stood up and ran towards the back of the apartment. However, he complied with the officer's orders to stop, returned and sat down.

Officer Olivares arrived. Officer Leddy then did a protective sweep of the apartment and spotted a baggie of marijuana in plain view, as well as a glass crack pipe. Smith admitted he'd tossed the marijuana and was arrested. The officer checked the area where Smith had been sitting, finding a bag of cocaine and Smith's ID, which confirmed his true identity. Walker refused a further consent to search, so Officer Leddy obtained a search warrant. More drug paraphernalia was found during that search.

Walker was charged with Possession of a Controlled Substance and Marijuana, and related offenses. She moved for suppression, arguing her initial consent was coerced. When that was denied, she took a conditional guilty to possession of drug paraphernalia, and appealed.

ISSUE: May an officer enter to verify the well-being of subjects inside, when given reason to believe there might be a problem?

HOLDING: Yes

DISCUSSION: Walker argued that the evidence should have been suppressed because the officer used a ruse to gain entry. In this case, although the officer had planned to find some way to get inside, to check out the tip, her statement at the door placed Officer Leddy within his rights "to follow up and confirm that everyone in the apartment was okay." The situation was created by Walker, not the officer, who testified that his original intent was circumvented when the situation changed.

Walker's conviction was upheld.

Martin v. Com., 2013 WL 4710334 (Ky. App. 2013)

FACTS; On December 13, 2010, Fulton, a realtor, requested Mayfield PD send an officer with him to go to a location. He was involved in selling an unoccupied home in the area, but had discovered the locks had been changed and someone was apparently inside. Officer Smith went with him. With the consent of the actual homeowner (Edwards), they entered. Inside, they found a fire burning in the fireplace, a mattress and several bags. Inside one of the bags they found a folder with Martin's name that contained naked pictures of young girls. The officers came back later to see if anyone had returned and met Justus and Martin. Justus had a key and indicated they had been given permission to spend the night there; he was unaware that the house was in foreclosure. (Martin later stated he'd relied on Justus about the permission.) Martin admitted the photos were his.

Martin was indicted for Possession of Child Pornography. He moved to suppress on several grounds and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does a trespasser have any expectation of privacy?

HOLDING: No

DISCUSSION: The trial court had concluded that the officers had consent from someone they reasonably believed could give that consent, and that Martin, as a trespasser (squatter) had no reasonable expectation of privacy.[5]

The Court also noted that Officer Martin was properly convicted of both possession of, and intent to distribute, material that depicted an actual sexual performance by a minor, and that was not double jeopardy. (The Court mentioned that he had posted photos on his Facebook page, as well, regarding minor females in sexual positions.)

Martin's plea was affirmed.

SEARCH & SEIZURE – ABANDONED PROPERTY

Mackey v. Com., 407 S.W.3d 554 (Ky. 2013)

FACTS: In early 2012, Deputy Gibson (Muhlenberg County SO) received complaints about a methamphetamine lab at a particularly address. He believed the property was owned by the Mackey family and contacted a member of the family. That person explained he no longer lived there, but gave consent for a search. "Notably, the record does not reveal who actually held title to the property." Deputy Gibson found the house "in an unlivable condition and concluded that the property was likely abandoned."

[5] Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005).

A short time later, he got a tip from Lambert, who said that Gibson "was planning to manufacture methamphetamine" on that property later that night. Since Gibson was seeking ingredients, Lambert agreed to give him crushed acetaminophen "in the guise of pseudoephedrine." Officer Gibson set up surveillance and in due course, Lambert and Gibson arrived, carrying the items needed. Gibson was taken into custody in possible of lithium batteries, tubing, and a baggie of crushed pseudoephedrine. Other items were found in the house.

Gibson was indicted for manufacturing methamphetamine and related lesser charges. At trial, he testified that it was Lambert who proposed the cook and that Lambert provided all the materials. He claimed to have only been a lookout. Gibson was convicted and appealed.

ISSUE: Does possible ownership automatically convey privacy rights?

HOLDING: No

DISCUSSION: Gibson argued that the search at the house was done without a warrant and was thus unlawful. Deputy Gibson had testified at the suppression hearing as to his belief that he believed the home was abandoned and unlivable. Gibson argued that it was not abandoned, that he had an ownership interest and in fact, that was his address on his OL. He was, in fact, however, living at a home in Central City at the time, and produced no evidence as to any ownership interest. The Court agreed that it was "unreasonable for an individual to maintain an expectation of privacy in property that he or she has abandoned."[6] The Court noted the lack of relevant case law, but agreed that it was "certain that the law does not deem properly abandoned simply because the owner is residing in another location." Further, it agreed, "such a holding would, in practical effect, open to door for law enforcement throughout this Commonwealth to conduct warrantless searches of other types of dwellings, such as uninhabited houses converted to storage buildings."

Nonetheless, the Court agreed that Gibson "did not have sufficient standing due to his failure to establish a possessory or ownership interest in the property."[7] The Court looked specifically at Foley v. Com., in which the defendant was found to be not the owner of record of a piece of property.[8] At most, in Gibson's case, the evidence indicated he had lived on (but not owned) the property at one time.

The Court upheld Gibson's conviction

[6] Watkins v. Com., 307 S.W.3d 628 (Ky. 2010).
[7] Ordway v. Com., 352 S.W.3d 584 (Ky. 2011); Sussman v. Com., 610 S.W.2d 608 (Ky. 1980).
[8] 953 S.W.2d 924 (Ky. 1997).

SEARCH & SEIZURE - FRISK

Jones v. Com., 2013 WL 5436520 (Ky. App. 2013)

FACTS: On the day in question, Lexington police received a call stating that Robin Helton (the caller's stepdaughter) was in a hotel room with a man named Howard, and that they were both using and selling drugs. Officer Norris arrived. As he approached the building, he spotted a man walking to a vehicle. The officer asked him if he was staying at the motel, and the man provided the room number that the tipster had given. He agreed his name was Howard. Officer Norris frisked Howard. No weapons were found and Howard was cooperative.

During the frisk, the officer felt a pill bottle; Howard confirmed it was such. Officer Norris "retrieved the bottle from Jones's pocket, but did not open it, and told Jones he was not under arrest, but was merely being placed in handcuffs for the officer's safety while he awaited backup." When a second officer arrived, Jones was asked (still handcuffed) what was in the bottle and finally admitted it contained drugs. The pills inside were eventually identified as oxycodone by various manufacturers.

Jones denied trafficking and claimed they were for his personal use. He consented to a search of his vehicle – nothing was found. Two females (one being Helton) also consented to a search, and again, nothing was found. Jones consented to a search of his room, almost $3,000 in cash was found along with various items. Jones agreed the cash was from drug sales, but identified other money ($750) as being his "personal money." Two cell phones were found on his person, "containing voice messages about drug sales." At the jail, almost $6,000 was found in his wallet, he was "adamant this was his personal money and not the result of drug sales."

Jones was charged and moved for suppression. The trial court had no problem with the frisk, but suppressed the pill bottle. However, since Jones gave consent (and under the inevitable discovery doctrine), everything from the motel room was admissible. When denied, he took a conditional guilty plea to trafficking and agreed to forfeiture of all of the cash. He then appealed.

ISSUE: Are items found improperly during a Terry frisk to be suppressed?

HOLDING: Yes

DISCUSSION: Jones argued that "*everything* seized as a result of the Terry frisk, which yielded no weapons, should have been suppressed." The Court concurred, noting that "Terry permits a patdown search for the limited purpose of officer safety and finding weapons; searching for evidence of crime is not an acceptable purpose."[9] The Court noted that until the pill bottle was removed and inspected, the officer had no way to know if it was contraband or not.

[9] Com. v. Crowder, 884 S.W.2d 649 (Ky. 1994); Adams v. Williams, 407 U.S. 143 (1972).

Further, the Court noted, "normally, items discovered through exploitation of unlawful police action must be suppressed as 'fruit of the poisonous tree."[10] Although an intervening event can serve to overturn that assumption, in this case, Jones's consent was not enough to remove the taint of the initial, unlawful search of his pocket. He was handcuffed and had not been given any rights, although he was under de facto custody, if not actual arrest. (The officer testified he considered Jones under arrest when he found the pill bottle, but had not told him so.) The Court couched Jones's consent more as "acquiescence."

The Court reversed the trial court's decision and agreed that suppression of all evidence was proper.

Jones v. Com., 2013 WL 4779749 (Ky. App. 2013)

FACTS: On the day in question, Jones was stopped by Officer Cooper (Lexington PD) and Agent Maynard (ATF) when it was noted that Jones was not wearing a seat belt. Jones "did not stop right away; instead, he acted nervous, checked his mirrors and seemed to be manipulating something in the center console of his car." Officer Cooper tapped his siren. When Jones pulled over, the officer "walked straight to the driver's side door and asked Jones to step out of the car, with the intention of conducting a Terry frisk to check for a weapon." Jones argued that the car was a rental and he would be late getting it back. Cooper did not find a weapon on the frisk.

When asked for ID, Jones pulled out his wallet and a baggy fell to the ground. It contained "little crumbles resembling crack cocaine," which it was. Jones refused a search of the car and a K-9 officer responded quickly. The dog alerted but no contraband was found. Jones was searched more thoroughly and 12 broken tablets of alprazolam (Xanax) was found. Jones said he had a prescription.

Jones was indicted for Possession of a Controlled Substance. He moved for suppression, arguing the traffic stop was improper. The Court denied the motion. Jones took a conditional guilty plea and appealed.

ISSUE: May actions that indicate someone might be reaching for a weapon in a vehicle sufficient to support a frisk?

HOLDING: Yes

DISCUSSION: Jones argued that the Terry frisk was improper, and based upon insufficient cause to believe he had a weapon. The Court focused on Officer Cooper's observation "that Jones was reaching around inside the car after he became aware that the police vehicle was behind him." The Court found that to be sufficient to justify the frisk and upheld the denial of the motion to suppress.

[10] Wong Sun v. U.S., 371 U.S. 471 (1963).

Frazier v. Com., 406 S.W.3d 448 (Ky. 2013)

FACTS: On June 7, 2008, Deputies Moore and Boggs (Boone County SO) were in a fast food drive through lane. They saw a passenger in another vehicle toss trash out of the car and decided to follow it. When that vehicle committed a minor traffic offense, they made a traffic stop. Frazier, the driver, appeared nervous and did not respond to a question about where they were going and who else was in the car. Deputy Moore had Frazier get out, and he was frisked by Deputy Boggs. Deputy Boggs felt an item in Frazier's front pocket that was "long, coarse and suspicious." Frazier denied the item and Boggs finally extracted it, finding it to be marijuana. Frazier was secured in a cruiser and the deputies searched the car, finding a "tire thumper." An onlooker reported that Frazier "appeared to be eating something." The deputies found marijuana crumbs on his face and clothing and another bag of marijuana in his possession. (Two marijuana screens were found in in wallet during booking.)

Frazier was charged with a variety of charges, including Possession of Marijuana and CCDW. He moved for suppression and was denied, with the trial court finding the frisk justified. Frazier was convicted and appealed. The Court of Appeals upheld the conviction and Frazier further appealed.

ISSUE: May a person's demeanor be used to justify a frisk?

HOLDING: Yes

DISCUSSION: First, Frazier argued that the frisk was improper. Deputy Moore argued that Frazier was nervous and initially uncooperative but that he did finally state the purpose of his travel. Frazier denied having anything on his person and refused to consent. Deputy Boggs justified the frisk on "Frazier's nervous behavior and belligerent response." Frazier objected adamantly to being frisked, as well. The Court reiterated the facts available at the time of the frisk: Frazier's minor traffic offense, his shaking hands, that he would not make eye contact, his initial refusal to answer questions, his "verbal belligerence" and his refusal to consent to a search. Based on these points, the Court agreed a person's demeanor could be a factor in deciding if a person was armed and dangerous, but that *alone* was not enough. None of the facts truly suggested that he had a weapon, the sole reason for a frisk. His refusal to answer questions or consent to a search "may have aggravated the officers," but such refusal was not a satisfactory factor. He did, ultimately comply and he was not actively belligerent once he got out of the car. The failure of the deputies to articulate any reasonable facts that would have led to a belief that he was armed convinced the Court to agree that the frisk was improper.

Further, the intrusion into his pocket was "constitutionally invalid" as well. "Simply put, once an officer, without manipulating an object, identifies it by touch as a weapon or contraband," they have probable cause to do a further search.[11] However, if manipulation is needed to identify the nature of an object, it is no longer "plain feel."

[11] Minnesota v. Dickerson, 508 U.S. 366 (1993); See also Com. v. Crowder, 884 S.W.2d 649 (Ky. 1994).

The deputy did not testify that he recognized the item specifically as a weapon or contraband, and in fact, stated that he opened the pocket to determine what the item actually was. Justification for a frisk cannot be developed during the frisk, it must exist before the frisk.

The Court also examined the vehicle search. Although the search might have been arguably valid under Arizona v. Gant, when drugs are found on the arrestee's person, the Court noted that "clearly the arrest must be lawful in the first instance to justify the ensuing vehicle search."[12] Since it was not, the evidence of the tire thumper could not be admitted, either, eliminating any possibility of a CCDW charge[13]

Frazier's conviction was reversed and the case remanded.

SEARCH & SEIZURE – SWEEP

McWilliams v. Com., 2013 WL 5436525 (Ky. App. 2013)

FACTS: On March 14, 2007, deputies from Bullitt County SO and members of the drug task force went to arrest McWilliams to serve an arrest warrant. He resisted but was eventually placed into custody. During a search of the premises, they saw evidence of manufacturing methamphetamine in the residence and an outbuilding, as well as a grenade with a trip wire. They called in the ATF and KSP's Bomb Squad.

Det. Waters submitted the following affidavit:

> WHILE EXICUTING[SIC] AN ARREST WARRANT ON GARTH McWILLIAMS AT 1091 HAPPY HOLLOW ROAD, MR. McWILLIAMS ATTEMPTED TO RUN TO TRAILER WHEN OFFICERS APPROACHED, BUT WAS APPREHENDED. MR. McWILLIAMS ADVISED THAT SOMEONE ELSE MIGHT BE IN THE AREA, SO THE FRONT DOOR OF THE TRAILER WAS STANDING OPEN. OFFICERS CLEARED FOR SAFTY ONLY. OFFICERS OBSERVED IN PLAIN VIEW IN THE KITCHEN AREA JARS WITH RESIDUE AND A JAR WITH A LIQUID WITH SEPERATION AND A PINK RESIDUE FLOATING ON TOP. ALSO IN PLAIN VIEW OFFICERS OBSERVED A COOLOER[SIC] WITH A TUBE COMING FROM IT LEADING TO A JAR. THERE WAS VARIOUS "COLEMAN" FUIL CANISTERS LAYING AROUND. AFTER CLEARING FOR OFFICERS SAFETY, OFFICERS LEFT THE AREA TO OBTAIN SEARCH WARRANT.

With the warrant, a multitude of items were found, including firearms, drug paraphernalia and suspected explosives.

McWilliams was indicted on a number of charges and moved to suppress the evidence. At the suppression hearing, Deputy Fowler testified that because McWilliams was

[12] 556 U.S. 332 (2009).

[13] It is questionable that a tire thumper would be a "deadly weapon" under Kentucky law, although arguably, it could be called a club.

considered armed and dangerous, he chose to take additional officers with him to serve the warrant. He agreed that McWilliams was outside when they arrived and that he was arrested and placed in the cruiser. He stated that McWilliams told him that other people might be in the area, so they "went into tactical mode and searched the area to ensure their safety." The spotted the booby trap (the grenade) when they went into a garage. He agreed that no one was found in the area, to his knowledge.

Major Ethington (Drug Task Force) testified that he knew McWilliams and that they had "received numerous complaints about the residence," including that he had been selling methamphetamine. Witnesses had reported that he had weapons and "protected the property with booby traps." When he learned that there was a "pill soak" seen in the trailer, he sent deputies to get a search warrant. No one was found on the property.

Det. Hardin, director of the task force, also testified. He did not arrive until McWilliams had been removed but had been at the location previously. Det. Waters testified that he'd looked into the trailer, which was open, and was "checking to see if anyone was inside." When told he might have "missed people," he went back into the trailer to look again and observed the "pill soak."

McWilliams denied that he'd told the officers anyone else was there and said that the trailer door had been locked. His girlfriend testified that the day after the arrest, the door prop and the lock was broken on the front door.

The Court denied McWilliams motion to suppress. He took an unconditional plea but later took a post-conviction motion, arguing his attorney did not represent him effectively.

ISSUE: May a suspect's statement that he does not know if anyone is in a building justify a sweep?

HOLDING: Yes

DISCUSSION; The Court reviewed the protective sweep under Maryland v. Buie.[14] In Com. v Elliott, Kentucky had recognized that "this type of search had 'been upheld in several courts in circumstances in which the police officers have reasonable grounds to believe that they may be in danger from areas not in the immediate vicinity of a defendant.'" The Court agreed that "there must be a 'serious and demonstrable potentiality for danger.'"[15] In Calhoun, the Sixth Circuit had "considered a warrantless search of the defendant's apartment after she was arrested outside:

> Because Calhoun was arrested outside her apartment, a warrantless search of the apartment could be justified only if the officers had a specific, reasonable basis for believing either that they were in danger from persons inside, as

[14] 494 U.S. 325 (1990).
[15] Com. v. Elliott, 714 S.W.2d 494 (Ky. App. 1986); U.S. v. Morgan, 743 F.2d 1158 (6th Cir. 1984).

analyzed in Buie, or that evidence might be destroyed, as analyzed in Vale v. Louisiana.[16]

In U.S. v. Colbert, the Court acknowledged that the location of the arrest, outside the home, is a factor in assessing "whether the officers have a reasonable articulable suspicion that a protective sweep is necessary by reason of a safety threat."[17] Finally, in Guzman v. Com., Kentucky had finally actually adopted Buie.[18] The Court agreed, however, that an exigency (and need to sweep) "did not arise until McWilliams was being put into custody [and] mentioned that he did not know if anyone else was present." At that point, the officers "had a reasonable and articulable reason to be concerned for their safety … particularly based upon the remote location in a wooded area with several buildings where an individual might be hiding."

The Court agreed the sweep was appropriate under the circumstances and as such, that everything seen during the sweep was admissible.

SEARCH & SEIZURE – EXIGENT ENTRY

DeCoursey v. Com., 2013 WL 4511937 (Ky. App. 2013)

FACTS: On January 22, 2011, Det Berhammer and other deputies (Christian County SO) went to serve arrest warrants on DeCoursey and Atwell. They noted the smell of a "strong chemical odor" from the house, and security cameras. No one answered a knock, although there were two vehicles in the driveway and a fan running. Det. Berhammer saw "several plastic bottles with tubing coming out lying on the front porch."[19] Det. Berhammer contacted the Commonwealth's Attorney's Office for advice and received approval to take action. They approached the house; Ms. DeCoursey came to the door. As it opened, the detectives smelled ether and anhydrous ammonia. They secured her and swept the resident, finding one person hiding in the bathtub and another in a bedroom closet. Items associated with methamphetamine production were found in plain view. The deputies secured the premises and obtained a search warrant.

DeCoursey moved for suppression and was denied. He appealed.

ISSUE: Does an active meth lab justify an exigent entry?

HOLDING: Yes

DISCUSSION: DeCoursey argued that "there were no exigent circumstances warranting the warrantless entry into his residence." The Court noted that the deputies simply swept the residence and did not do a full search; they "waited to search the

[16] 399 U.S. 30 (1970).
[17] 76 F. 3d 773 (6th Cir. 1996).
[18] 375 S.W.3d 805 (Ky. 2012).
[19] "Smoke bottles."

entirety of the residence until after securing the warrant." The Court agreed, however, that the detective's years of experience allowed him to know that an active lab presented "a significant danger both to the public and the police because of the high risk of explosion and exposure to toxic fumes." That was sufficient to create an exigency and justified the entry and sweep.

The court upheld the denial.

SEARCH & SEIZURE – VEHICLE STOP – COLLECTIVE KNOWLEDGE DOCTRINE

Jameson v. Com., 2013 WL 5436650 (Ky. App. 2013)

FACTS: On April 9, 2012, Jameson called 911 to report that his rental car had been stolen from a Lexington hotel parking lot. An ATL was broadcast several times. Later that night, the vehicle was recovered but the ATL was apparently never cancelled.

Officer Burks had heard the ATL that evening. On April 13, he heard that officers had seen the vehicle. Officer Burks did a "felony stop" and removed the occupants, including Jameson. Once Jameson learned the reason for the stop, he "repeatedly asserted" that the vehicle was lawfully in his possession. Officer Burks did a frisk and a baggie, containing oxycodone was "seen hanging out of Jameson's pocket." Jameson "had slurred speech and glazed-over eyes" – he admitted he'd taken a pill some 30 minutes before. Officer Burks had confirmed the ATL was active when he made the stop, but learned that in fact, it should have been cancelled several days before.

Jameson was later indicted for possession of the drugs and related offenses; he sought suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Are officers imputed to have knowledge of what other officers know?

HOLDING: Yes

DISCUSSION: The trial court had concluded that the stop was, in fact, improper, pursuant to the "collective knowledge concept." In Com. v. Vaughn, the court had applied this doctrine, which holds that "law enforcement officers can be held to the collective knowledge of other officers."[20] The Court agreed that "an officer may conduct a stop based on information obtained by fellow officers."[21] In this case, in contrast with Hensley, however, the "focus of the inquiry is not on what the arresting officer thought but instead what the issuing officer/department knew" – and in this case, the ATL was issued by Officer Burks' own agency.

[20] 117 S.W.3d 109 (Ky. App. 2003).
[21] U.S. v. Barnes, 910 F.2d 1342 (6th Cir.1990), U.S. v. Hensley, 469 U.S. 221 (1985).

The Court concluded, "in light of Vaughn, the knowledge that the ATL should have been removed is imparted to Officer Burkes as the collective knowledge concept applies prohibitively." Without that, he lacked any reasonable suspicion to make the stop. The Court also faulted the police department for failing to update its records for four days.

The Court then discussed whether the Exclusionary Rule should apply. It looked to Herring v. U.S.[22] and agreed that this was a "singular mistake" and "not deliberate, reckless, grossly negligent, or a recurring of systemic negligence." As such, exclusion would not serve to deter any improper conduct on the part of the officer.

The Court upheld the denial of the motion to suppress and affirmed his plea.

INTERROGATION

Smith v. Com., 410 S.W.3d 160 (Ky. 2013)

FACTS: On September 18, 2009, at about 11 p.m., Smith rode his horse to the Rigney's home in Wayne County. There he found Samantha Rigney, holding her young child, Jazzlyn, and Jonathan holding their son, Gabe. A cousin of Samantha, Conn, and Conn's son, Austin were also present. Samantha asked, as he approached, "why he was out so late." Smith drew a weapon and began to shoot, causing his horse to start bucking. The residents sought cover inside the house; Samantha was killed.

Wayne County deputy sheriffs went to the Smith's home, and his wife gave them permission to look for him. They found the horse, which had been recently ridden, and two beers in a saddlebag. They were unable to locate Smith and told his wife to have him call when he returned. He called about an hour later. They returned to Smith's home and told him why they were there; Smith stated 'that if he had shot somebody he could not remember doing so."

Smith was taken to the Sheriff's Office and questioned. He was given Miranda and admitted he'd been at the Rigney home, suggesting "that he had gone there to confront Jonathan because he believed that Jonathan had stolen property from his brother." First he said he had set off a large firecracker, and then, that Jonathan had gotten a rifle and pointed it had him. In an "alternate version," he said he'd set off the firecracker in response to Jonathan's threat. In a third version, he said he'd set off the firecracker but did not mention Jonathan's use of the rifle. He maintained throughout that he had shot no one.

Smith was convicted of Murder and related charges. He appealed.

ISSUE: Is an interview from a drunk subject admissible?

[22] 555 U.S. 135 (2009).

HOLDING: Yes

DISCUSSION: Smith argued that "the interview should have been suppressed because he was so intoxicated at the time of the interview that his statements were not knowingly, willingly, and voluntarily made." The Court noted that "generally speaking, no constitutional provision protects a drunken defendant from confessing to his crimes." The Court agreed ""[i]f we accept the confessions of the stupid, there is no good reason not to accept those of the drunk."[23] However, it noted that intoxication may be a factor if it is enough to make the subject more vulnerable to police coercion, and thus involuntary, or so much that that the subject is hallucinating, functionally insane or the like, making it unreliable.

However, neither was the case with Smith. Everything indicated that he "freely and knowingly accompanied the police … for the express purpose of submitting to questioning about his alleged participation in the shooting." There was no indication that he was so intoxicated as to make his statements unreliable.

Further, the Court agreed that Wanton Endangerment 1st was an appropriate charge for his shooting under the circumstances and that everyone present was at risk.

The Court upheld his conviction.

Buster v. Com., 406 S.W.3d 437 (Ky. 2013)

FACTS: On October 1, 2009, CHFS was informed of an allegation of sexual abuse. Bell, a social worker, interviewed the victim, who claimed Buster sodomized her. Patricia Buster, the wife of the suspect, was also named and provided Bell with the names of other children her husband had sexually assaulted, agreeing that she'd been involved in the crimes. Bell interviewed Buster (who was at that time incarcerated for an unrelated offense) and he confessed to the sexual assault of multiple victims. He was ultimately charged with hundreds of sexual crimes.

Prior to trial, Buster argued that he was not given Miranda warnings before being questioned by Bell. The Court overruled his motion, finding that "the fact that someone is incarcerated on an unrelated charge does not mean that the prisoner is 'in custody' for Miranda purposes." He took a conditional guilty plea and appealed.

ISSUE: Is an interview of a jailed subject custodial for Miranda purposes?

HOLDING: It depends (see discussion)

DISCUSSION: First, the Court agreed that Bell was a "state actor" – although not law enforcement – for Miranda purposes.[24] (This had been previously decided in Patricia Buster's related case.) His role was as an investigator that was to work in

[23] Britt v. Com., 512 S.W.2d 496 (Ky. 1974).
[24] Welch v. Com., 149 S.W.3d 407 (Ky. 2004).

cooperation with law enforcement and he was turning over information to officers regularly. In Buster's case, the interrogation took place in a small room inside the prison, with only Buster, Bell and a guard present. The Court weighed the facts available, noting that Buster was not told he was free to return to his cell initially. However, the interrogation was brief, he was not restrained in any way and had been given a drink. Bell did not speak in an aggressive or hostile manner and Bell stated that everything he'd said was of his own free will. The Court agreed that, under Fields v. Howe,[25] he was not in Miranda custody and as such, affirmed the denial of the motion to suppress.

Buster's plea was affirmed.

SUSPECT ID

Com. v. Parker, 409 S.W.3d 350 (Ky. 2013)

FACTS: On February 5, 2009, Martin was in the parking lot at a Lexington Target when "Parker grabbed her purse and struck her in the face." Parker and Masengale ran into the nearby neighborhood. Target called police and EMS. While waiting, Branham, the store manager, attended to Martin, who explained what had happened. She gave a description to Branham, the store manager, and a Target employee who overheard heard Martin's description stated she'd "seen the two men hanging around the store entrance." She was instructed to look at the security video to see if she could identify them. When she did so, "Branham made several still photographs of the men from the video." Martin "without hesitation" identified the two men.

Lt. Van Brackel arrived and broadcast the description out to officers in the area. Det. Iddings, who was in the store off-duty, assisted as well. Branham got a call from a witness, who stated he had not stopped because he had a child with him. However, he stated that he "had just seen the two men in his neighborhood." Masengale was apprehended and returned to Target, where Martin identified him in a showup. During questioning, he identified Parker. Parker was arrested and found with Martin's cell phone and iPod.

Masengale moved to suppress the showup, and Parker joined in, arguing that if the showup was tainted, "Masengale's identification of him was likewise tainted." At the subsequent hearing, the Commonwealth stated Martin would not be making an in-court identification. The trial court denied the motion to suppress, along with a related Brady[26] claim. The Court of Appeals reversed, holding that without Martin's testimony, the trial court did not have sufficient cause to upheld the identification. The Commonwealth appealed.

ISSUE: Are showup identifications admissible?

[25] 565 U.S. --- (2012).
[26] Brady v. Maryland, 373 U.S. 83 (1963).

HOLDING: Yes (but see discussion for details)

DISCUSSION: The Commonwealth argued that Parker did not have standing to challenge Martin's identification of Masengale, which led to Parker being identified. The Court agreed that showups are "inherently suggestive," but still a necessary tool.[27] In such cases, the Court would rely on the Biggers factors.[28] The trial court agreed that the circumstances were suggestive, as Martin was told that she would be seeing someone in custody "who matched the description she had given." Masengale was also in the custody of a police officer. However, the trial court had ruled it was reliable, as she had adequate opportunity to see the attacker and gave a "fairly detailed" description prior to the identification. She "did not hesitate" when she made the identification. The time lapse was only 15-20 minutes from the time it occurred.

The Court agreed that the Court of Appeals ruling was in error and that there was no case law that required a witness to appear at a hearing on the identification. Instead, the judge was permitted to make reasonable inferences based upon the information presented. Further, the Court knew when the crime occurred and when the arrest and questioning occurred and could extrapolate the time lapse.

The ruling of the Court of Appeals was overturned and the ruling of the trial court reinstated.

Barnes v. Com., 410 S.W.3d 584 (Ky. 2013) (modified from February, 2013 ruling)

FACTS: On May 24, 2009, Manning went to tend to a friend's home – as they were out of town. She was to water the plants and feed the cats, and had been going there twice a day. As she was tending to outside plants, she walked up the back deck steps. Through the sliding glass door, she "saw a person inside bending over removing the pole from the base of the door which secured it." She yelled at the person. They stared at each other and he then disappeared. She went around and discovered the front door was unlocked so she retreated to her car, nearby, calling a friend and her father, as well as 911. She waited up the street for the police. Officers discovered that entry to the house had been made through a pet door and that a glass panel on the back door was damaged. That door, too, was unlocked. The owners returned and found jewelry missing. A partial print was recovered from the jewelry box.

Manning gave a description of the subject. She was showing a photo array the next day but did not identify anyone. A couple of weeks later, detectives spotted a man in the area that fit the description, Barnes. He was questioned and a photo was taken; he denied any involvement. His explanation for being in the area, however, was "peculiarly suspicious." The next day, a photo of Barnes, along with similar photos, was presented to Manning. His photo was the one taken by the officers, the others were mug shots.

[27] Savage v. Com., 920 S.W.2d 512 (Ky. 1995).
[28] Neil v. Biggers, 409 U.S. 188 (1972).

Manning picked him out and said she was "100% positive." She was given a larger photo to view and again agreed Barnes was the subject.

At trial, she once again identified Barnes. However, he was considerably older than she originally stated and "there was some disparity in her previous description of his height and facial hair." Barnes was convicted and appealed; his conviction was affirmed. He further appealed.

ISSUE: Is an identification made from a valid photopak admissible?

HOLDING: Yes

DISCUSSION: Barnes did not initially object to the identification made, which required the court to look at his later appeal on the issue in a different light. The Court reviewed the pretrial identification process under the lens of Neil v. Biggers.[29] The Court noted that the photo array used by the police, in which Manning identified Barnes, was a "good lineup" and not "impermissibly suggestive." She had a good view of the suspect for some seconds. She was not even initially frightened, as she had encountered someone unexpectedly at the house before. Showing her the larger photo to confirm her identification was also permissible.

The Court also addressed an issue with the partial fingerprint that was lifted. The technician testified that he could only identify four points (not the 10 required) so he did not in fact even compare it to Barnes's prints. The Court noted that there was apparently some confusion during argument as to whether the comparison was made, but in fact, the trial record was clear that it was not.

Barnes' conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – EXPERT WITNESS

Oliver v. Com., 406 S.W.3d 437 (Ky. 2013)

FACTS: On September 16, 2010, Boggess (a cab driver) took Oliver from Lexington to Nicholasville. Upon arrival, Oliver "without warning and seemingly unprovoked, stabbed Boggess repeatedly through the driver's-side window and attempted to take cash from him before fleeing the scene on foot." Officers arrived and quickly apprehended him.

Oliver was charged with Assault 1st and Robbery 1st. Oliver claimed that he stabbed Boggess in self-defense during a drug transaction. At trial, Det. Elder (Nicholasville PD) testified "about his involvement in the case, which included photographing and investigating the scene." Elder explained that he observed blood on the interior of the driver's side door and the driver's seatbelt. When that was challenged as beyond the

[29] 409 U.S. 188 (1972).

detective's knowledge, Elder was permitted to testify about his 19 years of training and experience, which included "the investigation of bloody crime scenes. He was able to "identify distinct blood patterns, such as smears, droplets, and spatters." The Court found that sufficient to allow Oliver to testify about it. The next day, when Elder was asked about his opinion as to what had happened. The defense asked for a Daubert[30] hearing during which Elder testified that he'd had "eighty hours of formal crime scene investigation training wherein he learned how to classify blood patterns based on the effect of various physical forces on the blood." He had also been trained in homicide investigation. As a result, he was permitted to testify as an expert and stated that "he believed that Boggess was attacked inside the van.

Oliver was convicted and appealed.

ISSUE: May an officer qualify as an expert?

HOLDING: Yes

DISCUSSION: Oliver argued that it was improper to allow Elder to testify as an expert. The Court looked to KRE 702, the Court agreed that Elder was properly qualified as an expert by his "knowledge, skill, experience, training, or education" and as such, was permitted to testify in the form of an opinion. The Court noted that "crime scene reconstruction analysis requires a more specialized level of knowledge than simply offering a lay opinion or an observation based on common sense." However, in this case, "Elder possessed the requisite expertise to offer his opinion as to *where* the crime occurred." Although Elder admitted he was not overly familiar with the "advanced calculations used to determine the velocity and angle the blood evidence traveled," that was not critical in this case. The Court agreed his "formal crime scene investigation training as well as his nineteen years of investigative experience" was sufficient to qualify him to "offer his opinion concerning the location of the attack on Boggess."

The Court also agreed that admitting evidence, though his own testimony, that Oliver owed substantial child support was proper, for the purposes of showing that he had a motive to commit a robbery.[31]

Finally, Oliver argued that convicting him of both Assault 1st (KRS 508.010) and Robbery 1st (KRS 515.020) constituted Double Jeopardy. Oliver argued that serious physical injury, which is an element of the Assault charge, is a "natural consequence" of Robbery 1st, and that the "elements of the crime of assault are swallowed by the elements of the crime of robbery." The Court compared the two charges and applied the Blockburger[32] test. It concluded that each charge includes elements that the other does not. Certainly, serious physical injury could result from the use of a deadly

[30] 509 U.S. 579 (1993).
[31] KRE 404(b).
[32] Blockburger v. U.S., 284 U.S. 299 (1932).

weapon or dangerous instrument during a robbery, but it is not an element of that crime of robbery.[33]

The Court upheld Oliver's convictions.

NOTE: Det. Elder completed the Basic Investigator Course and the Homicide Investigation course given by DOCJT.

TRIAL PROCEDURE / EVIDENCE - CRAWFORD

Ratliff v. Com., 2013 WL 4710382 (Ky App. 2013)

FACTS: On March 9, 2006, Ishmal Ratliff's home in Pike County burned. Ratliff (not related to the victim) lived across the street with his grandfather, and Ratliff's father lived a short distance away. Ratliff's father was one of the first to reach the house; his son and the grandfather were already there. The fire was investigated by the insurance company. Seven days after the fire, the investigator found it to have been unsecured during the week. He ruled it undetermined as to the cause, although he suspected it was electrical.

Five years later, Ratliff was charged for Arson, Burglary and Theft. The Commonwealth theorized he'd burned the house in revenge for Ishmal's involvement in the prosecution of Ratliff's brother, Todd – but changed that theory to one in which Ratliff committed a burglary and then burned the house because of a fear of security cameras. Ishmael had reported that a number of items were missing after the fire – he did not file an insurance report but did tell the prosecutor about it. (At some point, a KSP trooper apparently went with Ishmal to recover some guns from Conn, but no report of a burglary or theft was made, although he had, apparently told KSP about what had occurred.) Ishmael sat in with law enforcement on two interviews and conducted his own investigation using informants. He learned of the location of the missing guns from Ratliff's stepmother. Several witnesses testified that Ratliff had claimed to have committed the crimes, but each of those witnesses had motive to possibly falsify and were impeached. Further, two witnesses were allowed to testify by affidavit that Ratliff sold the guns to Conn, a third party, Conn was at that point deceased.

Ratliff was convicted and appealed.

ISSUE: Are affidavits admissible?

HOLDING: No

DISCUSSION: The Court agreed that the affidavits and the witness testimony as to the origin of the guns was testimonial hearsay under Crawford v. Washington.[34] The

[33] Robbery 1st has three distinct possibilities that elevate a Robbery to the first degree – and simply the presence of a deadly weapon or threat of the use of a dangerous instrument is sufficient.
[34] 541 U.S. 36 (2004)

Court agreed that Heard v. Com.[35] and Rankins v. Com.[36] both noted that "our courts must vigilantly protect a defendant's Sixth Amendment right to confrontation by applying Crawford." The Court agreed that both affidavits (from Conn's son and widow) "were testimonial in nature and lacked personal knowledge." The Court further looked to Barnes v. Com.[37] and noted that the fact it was in the form of a sworn affidavit was immaterial. The Court agreed that his convictions must be reversed and remanded.

TRIAL PROCEDURE / EVIDENCE – JURY INSTRUCTIONS

Velez v. Com., 2013 WL 4511945 (Ky. App. 2013)

FACTS: In August, 2011, Velez and his girlfriend (Katie) lived in Covington. Hutton and his family lived down the street. Katie and Hutton's daughter, Crystal, got into an argument, and eventually, Katie took a swing at Crystal. Hutton intervened, pulling Crystal into their yard. Hutton ushered his children inside. Brandon, Katie's brother, "rattled the chain-link fence and yelled for Hutton to come back to the street." Hutton turned and Velez "ran into the yard and struck Hutton in the head with a large tree limb, lacerating his scalp." Velez ran back to his apartment. Hutton suffered brain injuries and underwent emergency surgery. Velez (and Brandon) were arrested and charged.

At trial, the prosecution presented several witnesses. Velez failed to appear on the second day and a bench warrant was issued. The defense presented no witnesses. Velez was convicted of Assault 1st and appealed.

ISSUE: Is a self-defense instruction always required?

HOLDING: No

DISCUSSION: Velez argued that he was entitled to a self-defense instruction, which the trial judge had refused to give. The Court agreed that the trial judge must instruct the jury on an affirmative defense (such as self-protection) "when a juror could reasonably conclude from the evidence that the defense exists." The Court agreed that he had neither testified, nor presented any evidence, that suggested the instruction was warranted. Neither did the evidence suggest that his behavior was wanton, rather than intentional. Further, the evidence suggested that he fled the scene and changed clothes.

The Court upheld his conviction.

[35] 217 S.W.3d 240 (Ky. 2007).
[36] 237 S.W.3d 128 (Ky. 2007).
[37] 794 S.W.2d 165 (Ky. 1990).

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Dukes v. Com., 2013 WL 5436261 (Ky. 2013)

FACTS: In September, 2011, Dukes was on parole and was under a deferred prosecution program. He was to report to Officer Newman, his parole officer. Officer Newman received several anonymous tips that Dukes was manufacturing methamphetamine. He corroborated the tips with fellow officers, who knew Dukes.

About the same time, Deputy McCoy (McLean County SO) received a tip from a gas station that Dukes had purchased a large amount of ether. Soon thereafter, he made a traffic stop on a relative of Dukes who also smelled strong of ammonia – the relative stated he was coming from Dukes' home.

Officer Newman and Deputy McCoy exchanged information; Officer Newman decided to pay a visit to Dukes' mother's home, where Dukes was living. He, Deputy McCoy and another officer went there on October 27, 2011. Dukes was not there, but his mother "consented to a cursory search of the home to confirm" that. The officers then searched an out-building and found evidence of manufacturing methamphetamine.

Dukes was indicted and moved for suppression. At the hearing, the officers testified that they asked Dukes about the outbuilding and that his mother said that Dukes spent a lot of time there. They asked for consent to check it and she agreed. They testified that the smelled ether as they approached and that his mother "walked with them to the building and turned the door knob to allow them in the building." When they looked inside, they saw obvious evidence of manufacturing. At that point, they obtained a warrant for Dukes's arrest. Ms. Dukes testified, however, that she did not consent and that the door was locked – and the keys lost. The trial court ruled that consent was given. Dukes took a conditional guilty plea and appealed.

ISSUE: Is someone living in a common area of a residence able to overturn a consent from the owner?

HOLDING: No

DISCUSSION: The Court noted that the trial court heard testimony from two officers and Dukes's mother – and that the testimony was competing and inconsistent. In deciding that the officers were more credible, the Court "appropriately performed one if its essential functions in deciding between these competing stories" in a pretrial hearing.

Further, in this case, Dukes was not the actual owner of the property and "lived in a common living room while at the residence" rather than a private room. He apparently spent the bulk of his time living elsewhere, with a girlfriend. His mother "clearly had the authority and relationship to the home and out-building that she owned to consent."

Dukes' plea was upheld.

Stephenson v. Com., 2013 WL 3897421 (Ky. App. 2013)

FACTS: In March, 2009, McKee was an information making controlled buys for the KSP. McKee contacted Det. Clark, telling him he had a deal to buy 10 Oxycontin pills from Stephenson, who he knew as Castle. Det. Clark met with McKee, searched him, equipped him with a recording device and gave him cash. McKee entered to make the deal, but was unsuccessful. Stephenson contacted Perry to set up the transaction, and McKee rode with Stephenson to go to Perry's home. Det. Clark followed.

When Stephenson went inside Perry's home, McKee provided information to Clark about vehicles in Perry's driveway. He also found information in the car that provided Stephenson's real name, which corroborated Clark's information as to who owned the vehicle. Stephenson emerged. He provided 10 pills to McKee, but also suggested that he had many more in his possession. The pills were confirmed to be Oxycontin.

Stephenson was indicted and went to trial. He was convicted and appealed.

ISSUE: Is testimony on prior crimes committed by the defendant admissible?

HOLDING: No (as a general rule)

DISCUSSION: .Stephenson argued that the prosecutor impermissibly introduced evidence that indicated that he was under investigation for other drug crimes, and had in fact been indicted on two other cases. The Court agreed this was improper and warranted reversal.

The Court also discussed the admission of the audio recording. It noted that this tape did not just include conversation between McKee and Stephenson, but also narration of what McKee was observing. The Court stated that the "narrative statements made on the tape are clearly a description of past events, even though very recently past. They were not made in the context of an ongoing emergency and they were not made during the actual course of the drug buy as it was occurring."[38] The Court concluded however, that his would not, in itself, have warranted reversal.

The Court reversed Stephenson's conviction based on the first issue.

[38] See Baker v. Com., 234 S.W.3d 389 (Ky. App. 2007).

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Calloway v. Com., 2013 WL 5436260 (Ky. 2013)

FACTS: In 2004-2005, when Anna was between 6 and 7 year old, she was raped by Calloway, her mother's boyfriend at that time. This was not disclosed under 2009, when Anna was 11 and in therapy. She stated it had occurred more than once, but could not say it had happened any particular number of times. She did testify that it happened the same way every time – in her bed and after the household was asleep.

Calloway was convicted, of Rape and Sexual Abuse. He appealed.

ISSUE: Do Rape and Sexual Abuse generally constitute Double Jeopardy?

HOLDING: Yes (but see discussion)

DISCUSSION: Calloway argued that being convicted of both rape and sexual abuse, for a single event of sexual intercourse, was improper. The Court agreed that rape was a form of sexual contact (needed for sexual abuse) and that necessarily, if rape occurs, so does sexual contact/abuse. The jury was not instructed as to the "factual differentiation between the charges," and although it is possible to convict on both "if there are two independent acts of criminal conduct and the instructions" make that clear, that was not done in this case.

Further, Calloway argued that the time span included in the instructions, from 2001 to 2008, rather than 2004-2005, when he actually lived with the victim, was too broad. The Court agreed it was improper, but held that to be harmless error in the face of the evidence actually presented at trial.

The Court vacated the conviction on the double jeopardy violation.

Haley v. Com., 2013 WL 4508177 (Ky. App. 2013)

FACTS: Haley was convicted in Logan County for Receiving Stolen Property. The items had been stolen from a home in Simpson County but pawned, and subsequently located, in Logan County. Haley took a guilty plea. He was subsequently charged with Burglary and Criminal Mischief, and PFO, in Simpson County. He was convicted of that, as well, He appealed.

ISSUE: May a person be convicted of Burglary and Receiving Stolen Property?

HOLDING: Yes

DISCUSSION: Haley argued that convicting him of the two crimes violated double jeopardy. The Court, however, disagreed, looking to Phillips v. Com., which held that the two offenses were separate and distinct.[39] As such, he could be convicted of both.

Haley also argued that it was improper to admit the testimony of Trooper Dukes (KSP) who spoke about the surveillance video taken at the pawn shop. (The video itself was not admitted because it had been inadvertently erased after he viewed it.) The Court agreed that under KRE 1004(1), it could be admitted because the original was destroyed, not in bad faith but simply due to a mistake. And, any possible error related to the destruction was harmless since Haley had admitted to his action when he pled guilty to the crime in Logan County.

With respect to DNA swabs, there was apparent confusion regarding the collection of two swabs, from each of the two Haley brothers, one of which was taken pursuant to a warrant, apparently. Despite some difference in testimony as to who took which swab, the Court agreed that they were taken at two different locations and that the swabs were never commingled.

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Morton v. Com., 2013 WL 2660364 (Ky. App. 2013)

FACTS: On December 16, 2010, a Super 8 in Whitesburg was robbed. The front desk clerk gave an individual permission to use the restroom. When the man emerged, he questioned the clerk if he was alone and if the manager would return. The man never removed a full-face toboggan he was wearing. The clerk gave him a soda and noted that when he raised the toboggan to drink, he had a "busy goatee." Longworth, the clerk, became suspicious as the man wandered around, including behind the desk, and finally, the man "produced a kitchen knife and held it to Longworth's throat." He took what was in the register but not satisfied, told Longworth he knew where the staff kept the money in the office. He took that money and threatened Longworth if he called the police. Longworth refused to be closed in the laundry room and instead, fled up the stairs. The man left.

The police arrived and Longworth gave a detailed description of the man's clothing and facial hair. The money taken was mostly in $1 and $5 bills, in rubber bands, and wrapped coins. Searching the area, the officers learned that Morton had come into a convenience store nearby and was wearing the same clothing. A surveillance video confirmed that it was Morton.

Later that night, they found Morton in the back seat of a vehicle pulling out of his driveway. Morton was trying to conceal currency between the seats, along with rubber

[39] 679S.W.2d 235 (Ky. 1984).

bands. He had shed some of the described clothing. Taken back to the motel, he was identified by Longworth. Without the toboggan, Longworth recognized Morton as the son of a woman who'd worked at the motel previously. Morton was indicted on charges of Robbery, Theft and Retaliating Against a Witness. He was convicted of Robbery and Retaliating, and appealed.

ISSUE: May an officer testify as to something that is the ultimate issue in a case?

HOLDING: No

DISCUSSION: During the trial, Officer Stone testified that Morton's clothing in the surveillance video at the convenience store matched the description of the robber's clothing, given to him by the clerk. Chief Fields testified that he "concluded that [Morton] robbed the hotel" as a result of his investigation. He also mentioned that Morton had plenty of time to change his clothes (which didn't match) before he was located. Defense counsel had objected to officers giving "'ultimate issue' testimony" and the trial court had provided an admonition. The Court agreed it was improper for a witness to provide an opinion that a defendant his guilty, and as such, the officers' responses that that effect were an error. However, the Court agreed that the admonition was sufficient to cure the error as the testimony was not "devastating" to the case – but was something that the jury could readily deduce on its own.

The Court, however, did agree that the conviction for Retaliating must be reversed, as the only fact submitted to prove that charge was that he told the clerk that if he called the police, he would be back. The Court agreed that was part of the robbery, itself, and not retaliation.
The Court upheld the Robbery conviction.

TRIAL PROCEDURE / EVIDENCE - BRADY

Browning v. Com., 2013 WL 4680486 (Ky. 2013)

FACTS: Browning, his wife Nicole, their four children and Nicole's parents shared a trailer in Bullitt County. At some point, in 2010, Nicole became suspicious that Browning was engaging in an inappropriate relationship with their pre-teen daughter, G.B. She placed a digital recorder under the bed before she left the house with the other three children. When she returned and checked the recorder, she heard suspicious activity. She took G.B. to the Bullitt County Sheriff's Office where she was interviewed. G.B. admitted having had oral sex with her father and that he'd attempted intercourse.

Browning was charged with Sexual Abuse, Unlawful Transaction with a Minor, Incest and PFO (on the basis of a prior child support conviction). Over the course of the pretrial, Browning requested dismissal based upon the alleged failure of the prosecution to produce requested discovery. A few weeks before trial, the discovery material was

reviewed by the court and then passed on to Browning. The Court denied his request to delay the trial. The Commonwealth continued to provide discovery right up into the week before trial, and again, Browning requested and was denied a delay. During the trial, Browning learned that G.B. had been undergoing counseling (which allegedly the prosecution knew nothing about), and that he'd gotten no records of it. The trial court denied the motion, stating that he hadn't asked for them. During the testimony of a CHFS investigator, Browning further learned that they also had documents which had not been provided to him. The Court recessed the trial to allow Browning time to review them. When the Court reconvened a few days later, Browning again demanded a dismissal or a retrial. Finding that some records had, in fact, not been provided as required, the Court declared a mistrial.

Browning's case was retried a few months later. He was convicted and appealed.

ISSUE: Does a failure to get requested records require reversal?

HOLDING: Not always

DISCUSSION: Browning objected to the use of his statement following his arrest. He alleged that one of the deputies choked him to the point of unconsciousness and that he confessed to "stop this abuse." He stated he was coached by the deputies as to what to say. He did not report this to the jail (and signed a form that indicated he had no injuries) – but he said he didn't read the document before he signed it. (The deputy jailer who did the intake stated he reviewed the forms with Browning and did not notice any injuries.) Sheriff Tinnell testified that he was present at the first, brief, interview and that he explained Browning's rights. The waiver was signed in the Sheriff's office. Deputy Fowler testified that he made the arrest that Browning was never placed in a holding cell (as he alleged). Det. Cook testified that he interviewed Browning and took a video statement, but that he did not choke (or observe anyone choking) Browning. He also stated that he did not tell Browning what to say. The Court agreed that Browning's statement was voluntary and not as the result of any coercion.

The Court further determined that although he did not get all of the records to which he was entitled, it was not due to the bad faith of the prosecution. (Partially, in fact, it was the Court's error, as it failed to review and pass on the records in a timely manner.) Browning also objected to the Deputy Jailer introducing the intake form about which he was testifying. The court agreed that it was proper to allow him to do so, even though he was not the "official custodian" of the record. He prepared the form, "had knowledge that the form was what it purported to be and he was qualified to authenticate it."[40]

The Court affirmed the decision.

[40] KRE 901(b)(1). See also KRE 801A(b) and 803(6).

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Gonzalez v. Com., 2013 WL 4632714 (Ky. 2013)

FACTS: During Gonzalez's trial for the sexual abuse of his daughters and step-daughter, two of the girls were permitted to testify about uncharged acts of sexual abuse. The prosecution had notified him that it intended to offer "prior bad act" evidence under KRE 404(b) and it was admitted over his objections. He was convicted of Sexual Abuse, Sodomy and Incest and appealed.

ISSUE: May uncharged crimes be admitted if used to show an intent, plan or absence of mistake or accident?

HOLDING: Yes

DISCUSSION: The Court noted that normally, evidence of uncharged crimes is not admissible. However, it can be admitted "if the evidence falls within one of the exceptions set forth in KRE 404(b)(1)" and also passes the balancing test under KRE 403. The Court agreed that in Noel v. Com., it had admitted such evidence "to prove intent, plan, or absence of mistake or accident." In addition, "evidence of similar acts perpetrated against the same victim are almost always admissible."[41] The Court agreed the evidence was properly admitted.

The Court also addressed the testimony given by Dr. Crick, repeating statements made to him during his examination of two of the girls. The Court agreed that the statements made, describing what had been done to them, fell within the hearsay exception of "KRE 803(4), which allows "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history . insofar as reasonably pertinent to treatment or diagnosis."" Dr. Crick properly did not identify Gonzalez, only using the pronoun "he." A statement made by one of the girls as to when the abuse happened (while her mother was shopping) was at most a harmless addition to a statement otherwise admissible.

Gonzalez's convictions were affirmed.

Tramble v. Com., Ky. 2013

FACTS: In February, 2009, Postal Inspector O'Neill was investigating marijuana being transported through the Cincinnati post office. She was focusing on Cottrell and through that investigation, learned about Tramble.

In August, she got a call from Deputy Kappes (Boone County SO) about a package being mailed to a PO box in Crescent Springs, in Tramble's name. A warrant was obtained; the package was intercepted and opened. It contained over two pounds of marijuana. The package was rewrapped and eventually handed over the Tramble by a

[41] 76 S.W.3d 923 (Ky. 2002).

deputy posing as a clerk. Tramble was stopped as she left the post office and admitted she knew the package, and a second one that she picked up, contained marijuana. She was supposed to deliver both – totalling 17 pounds - to Cottrell. She offered to cooperate but it could not be set up with Cincinnati, so she was charged with Trafficking. At trial, she argued that she did not know the packages contained marijuana.

Tramble was convicted and appealed. The Court of Appeals overturned her conviction and the Commonwealth appealed.

ISSUE: Are prior bad acts admissible?

HOLDING: Yes

DISCUSSION: The Court of Appeals had ruled it was improper to admit evidence that "other than the one charged" there had been other occasions where marijuana had been mailed to Tramble. The Supreme Court noted that her argument at trial was that she did not know the packages contained marijuana and it was proper to refute that with evidence that she'd previously accepted marijuana. As such, such "prior bad act" evidence was admissible to prove the mental state in the charged offense – knowingly.[42]

Further, the Court agreed that evidence of the Cottrell investigation was also admissible, as his "prior scheme to traffic in drugs" fit within the exception as well.

Tramble's conviction was reinstated.

TRIAL PROCEDURE / EVIDENCE – RULE 7.24

Curtis v. Com., 2013 WL 4508006 (Ky. App. 2013)

FACTS: Curtis was convicted on one charge count of Trafficking and acquitted on a second. Prior to the trial, however, the Court had ordered the Commonwealth to "disclose incriminating statutes pursuant to" RCr 7.24. The prosecutor filed two discovery responses, each over 15 pages, and a CD. However, the material did not explain how Curtis's true identify was obtained, as he was only identified by aliases in the material. At trial, an officer explained how he'd gone to a location where Curtis's vehicle was parked and obtained his information under the pretense that the vehicle had been involved in a hit and run. This information was only produced at trial. The defense argued against its admission, but it was admitted.

Curtis appealed.

ISSUE: Must oral inculpatory statements be disclosed to the defense?

[42] KRE 404(b).

HOLDING: Yes

DISCUSSION: The Court looked to RCr 7.24 and Chestnut v. Com.[43] which required the disclosure of "the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness." During the trial, the defense had used the strategy of mistaken identity, which it likely would not have pursued had they known about the identification. However, defense counsel was aware of the identification issue and it is unlikely the result of the trial would have been different.

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – PROOF

Martinez v. Com., 2013 WL 4680484 (Ky. 2013)

FACTS: On November 29, 2008, Officer Hardy (Louisville Metro PD) received a call about a crowbar, with what appeared to be dried blood, being found near a dumpster. He responded, collected the item and contacted homicide. A short time later, he was told that a body had been found in the trunk of a car nearby. Gonzalez was identified as the victim, and the vehicle was registered to him. A t-shirt, which gang names written on it, was in the trunk and they believed that the murder was gang-related.

Deputy Smith and Det. Stalvy also found a bloody blanket in the dumpster and the faceplate to a stereo nearby – significant because the vehicle where the body was found was missing its stereo faceplate. More blood was found on the ground. Deputy Smith spoke with Martinez and Pierce at the apartment and "other men began running from the apartment through another door." Skaggs stayed in the apartment. Seeing blood inside, Smith got a search warrant. Blood stains were found throughout the apartment, and there was evidence that blood had been wiped off the walls. A bloody rag and evidence of more cleaning was in the bathroom.

Martinez, Pierce and Skaggs were taken to Homicide and questioned. Martinez said he stayed at the apartment on occasion and had been there in the early morning hours of the day in question. He took trash to the dumpster, but denied seeing any blood initially. (He later said "he might have seen some possible blood on the couch, but did not know if it was blood.)

Gonzalez was shown to have been beaten to death, although he also had stab wounds, had been strangled and was missing an ear. Eight months after the murder, Martinez admitted that he knew some of the people who'd been in the apartment, and admitted that the trash he took out contained bloody clothing. A month later, he placed himself

[43] 250 S.W.3d 288 (Ky. 2008).

in the apartment earlier than he had before, and stated he'd seen quite a bit of blood, and a knife. He did not admit to participating in the murder, however.

Ultimately, Martinez and Pierce were charged with Murder, along with Fox. (Fox took a plea agreement.) Fox testified that when Gonzalez arrived at the apartment, an argument (in Spanish, which he did not understand) took place and that three men, Martinez, Pierce and another, commenced to beating on Gonzalez with beer bottles and a crowbar. He went into the kitchen, and subsequently Pierce came in, got a knife and left again. "Fox heard a sawing sound." Pierce latter showed him an ear. They worked together to dispose of the body and clean up the apartment.

Other witnesses testified that Pierce had given various confessions. Martinez was convicted of Complicity to Murder and Tampering. He appealed.

ISSUE: Is mere knowledge that a crime is occurring sufficient for conviction?

HOLDING: No

DISCUSSION: Martinez argued that while he was present, there was no evidence directly linking him to the murder. The Court agreed that "[o]ne's mere presence at the scene of a crime is not evidence that such one committed it or aided in its commission."[44] Further, "mere knowledge that a crime is occurring is insufficient to support a conviction of that crime, as is mere association with the persons involved at the time of its commission."[45]

However, the Court noted that testimony indicated Martinez was, in fact, very much involved in the crime as he admitted having disposed of trash, including bottles and bloody clothing. He allegedly ordered a witness to help clean up the apartment.

Martinez's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – JURY

Springfield v. Com., 410 S.W.3d 589 (Ky. 2013)

FACTS: On December 24, 2010, Springfield and friends were at his apartment when Eisenhower "stopped by to purchase some crack cocaine." Springfield did not have any, so he went to another location to get some, as a favor. However, he was unaware that Eisenhower was working to Deputy Sheriff Bean (Hopkins County SO) to make the buy as a paid informant. Some months later, Springfield was indicted for Trafficking. He was convicted and appealed.

[44] Houston v. Com., 975 S.W.2d 925 (Ky. 1998); Rose v. Com., 385 S.W.2d 202 (Ky. 1964).
[45] Hayes v. Com., 175 S.W.3d 574 (Ky. 2005).

ISSUE: May a jury be allowed to view a recording of a drug transaction unsupervised?

HOLDING: Yes

DISCUSSION: Springfield argued that it was improper to allow the jury to take the recording made of the transaction back into the jury room, and presumably view it, unsupervised. He argued that the court rules prohibited providing electronic equipment to the jury to be used outside the courtroom. The Court disagreed, finding the transaction to be nontestimonial evidence, rather than testimonial (such as a video of a witness's testimony) and as such was properly allowed in the jury room. The Court found them to be "real life replays of the central event in question" – no different than photographs.

The Court upheld his conviction.

Sears v. Com., 2013 WL 4680448 (Ky. 2013)

FACTS: Sears was convicted in Jefferson County of Tipton's murder. During the jury deliberations, jurors were not permitted to have their cell phones, which were to be placed with the bailiff for the duration. If they needed to make a call, they would only be permitted to do so under supervision. Sears later appealed, arguing that allowing any access at all would permit outside influence and "bestowed improper authority to the bailiff." Sears was convicted of Murder and appealed.

ISSUE: Does allowing jurors access to their cell phones to make calls (supervised) invalidate their deliberations?

HOLDING: No

DISCUSSION: The Court noted that the trial judge had given the jurors admonitions about communications during the trial and deliberations, and further, that there was no indication any juror actually even made a call. However, the Court noted that under Winstead v. Com., it was "perfectly acceptable to allow jurors access to cell phones and other electronic forms of communications" to handle needs such as transportation and childcare.[46]

The Court upheld Sears' conviction.

[46] 327 S.W.3d 386 (Ky. 2010).

TRIAL PROCEDURE / EVIDENCE – COMPLETE DEFENSE

Speros v. Com., 2013 WL 4512016 (Ky. App. 2013)

FACTS: On March 6, 2011, Speros allegedly inserted his toe into the vagina of the daughter of his fiancée, Pompillio, while they were lying on the couch watching a movie. (The child's grandmother was also sitting on the couch at the time.) The child later told her mother, who confronted Speros. He said if it happened it must have been an accident while he was sleeping. An examination indicated that an assault did, in fact, occur. Pompillio took the child to KSP and Speros was arrested. He was subsequently convicted of Sexual Abuse and appealed.

ISSUE: Is a defendant entitled to bring in large physical exhibits?

HOLDING: Not necessarily

DISUCSION: At trial, Speros asked to introduce the actual sofa cushions, described as very soft, because, he argued, the accusations were "physically impossible." The trial court had denied the motion, finding that the entire couch would have to be brought in, and that was unnecessary as the jury had photos of the couch and the seating arrangement. The Court upheld that ruling.

The Court also agreed that allowing a Trooper to testify that Speros had professed his innocence was enough and that his reference to his willingness to take a polygraph was properly struck from the statement given to the jury.[47]

The Court upheld Speros's conviction.

McGregor v. Com., 2013 WL 4680444 (Ky. 2013)

FACTS: On October 10, 2010, Asher and McGregor intended to go to a celebration at Asher's family's home. According to McGregor, when she picked him up at 10 a.m., Asher was "already 'half-lit'" McGregor began to drink as well. After their arrival, Asher got into a fight with her sister and was told to leave because she was so intoxicated. McGregor drove to Asher's daughter's house and they were again asked to leave. McGregor then drove them to his grandparents' home where they stopped to eat. McGregor then "began driving toward" a market so Asher could make phone calls, but on the way there, they were involved in a crash in which Asher died.

McGregor was convicted of Manslaughter, Wanton Endangerment and DUI. He appealed.

ISSUE: Are gruesome photos generally admissible?

[47] Morton v. Com., 817 S.W.2d 218 (Ky. 1991).

HOLDING: Yes

DISCUSSION: McGregor argued that he should have been allowed to introduce evidence as to Asher's extreme intoxication to show why he was driving that day, when he'd never planned on doing so. Further, he argued, her intoxication was distracting to him and caused the wreck. The Court, however, noted that Asher's intoxication "had nothing to do with whether [McGregor] perceived the associated risks of getting behind the wheel of the car" - in fact, it showed he did appreciate the danger of drunk driving."

McGregor also protested against the admission of photos of the crash, which showed that "Asher's head was sliced open and her brain was essentially knocked out of her skull, as the photographs in question clearly depict." The Court noted that the "general rule regarding the admissibility of crime scene photographs is that photographs do not become inadmissible simply because they are gruesome."[48] Four photos were admitted, including one that showed "Asher's brain lying on the seat beside her." The Court agreed that particular photo should not have been admitted, given its "highly inflammatory" nature, but found that that other three were proper, although gruesome. However, the Court ruled that the error was harmless, given the overwhelming amount of other evidence.

McGregor's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – AGE

Rodriguez v. Com., 396 S.W.3d 916 (Ky. 2013)

FACTS: Rodriguez was indicted for Incest with respect to his daughter, which began when the girl was 8 (in 2005) and continued until his arrest in 2010. At trial, the question of her age was not actually addressed – and is a factor in determining sentencing since Incest is a Class A felony when committed on a victim under 12.

Rodriguez was convicted and appealed.

ISSUE: Is proof of age important in an Incest case?

HOLDING: Yes

DISCUSSION: The Court agreed that the evidence, when considered in toto, indicated that the child testified that the sex began when she was 8, a fact to which Rodriguez had admitted in a taped interview as well.

With respect to his sentencing, however, the Court noted that the indictment charged him only with a single class of incest. Because the victim passed the age of 12 during the five years in question, the jury was not given the opportunity to indicate at what point

[48] Clark v. Hauck Mfg. Co., 910 S.W.2d 247 (Ky. 1995).

they believed that single charged act occurred. As such, although convicted, it was not clear that the jury verdict was unanimous that the act of incest occurred before the child turned 12.

Rodriguez's conviction was reversed and the case remanded.

TRIAL PROCEDURE / EVIDENCE – GRAND JURY

Com. v. Royse, 2013 WL 5436523 (Ky. App. 2013)

FACTS: Royse was indicated for neglect in a case involved a resident of a nursing facility in which she worked. Ultimately, however, the case was dismissed because the inspector made false and misleading statements to the Grand Jury. The case was originally dismissed with prejudice, but was later changed to without prejudice. The Commonwealth appealed the dismissal.

ISSUE: Does an incomplete presentation of the facts to the Grand Jury lead to an invalidation of the indictment?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that there was no demonstration that the investigator did "knowingly or intentionally presented false, misleading, or perjured testimony to the grand jury." The Court looked to the specific facts available to the trial court and agreed that there were material facts not provided to the Grand Jury. The Court agreed that the jury was misled and that "simple mistakes and misunderstandings" were "made to appear to be conduct constituting a felony charge."

The Court agreed that a dismissal was proper under the circumstances.

OPEN RECORDS

City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842 (Ky. 2013)

FACTS: In 2007, McCafferty was accused of shooting her husband in Fort Thomas, and ultimately, was convicted of Manslaughter. She agreed to waive any appeal in exchange for a promise of the possibility of parole after serving twenty percent of an 18 year sentence. Two recordings were made during the investigation by law enforcement.

Following her conviction, but prior to sentencing, a local TV station obtained the two recordings, with portions redacted containing footage of the interior of the house – the City claimed that was an unwarranted invasion of the family's privacy. Three weeks later, the Enquirer requested the same records and was denied completely, with the City invoking the law enforcement exemption. The City claimed that since McCafferty could still take a collateral attack on her conviction, the case was not yet over.

In proceedings before the Attorney General, the Campbell Circuit Court and the Kentucky Court of Appeals, the newspaper argued that the enforcement proceeding against McCafferty was, in fact, complete due to her sentencing agreement. And, even if by chance she could raise an issue, the "law enforcement exemption applies only to disclosures that would 'harm' the agency in such a proceeding," and no such harm had been demonstrated. This was "especially and patently so with respect" to what had been released in discovery and shown in trial, and that which had already been released to the TV station. Although agreeing that the newspaper was entitled to what had been given to the TV station, it sided with the City on everything else, finding that there was a possibility (however low) of a collateral challenge. The Court of Appeals agreed that, pursuant to Skaggs v. Redford,[49] Kentucky's interest in prosecuting McCafferty "is not terminated until [her] sentence has been carried out." However, the Court of Appeals ruled that the "harm" element required "a definite and substantial showing by the agency that release of the requested records would interfere with a prospective enforcement proceedings, i.e., a showing more definite and substantial than the generalized and purely speculative harms the City had so far adduced." It remanded the case back for a "more particularized consideration," and the release of any records that did not meet that standard.

The City appealed.

ISSUE: Must a law enforcement agency justify holding back investigative files specifically?

HOLDING: Yes

DISCUSSION: The Court noted that both parties agreed that the Fort Thomas Police Department had compiled, and maintained, an investigative file on the case and that McCafferty's "conviction remained subject to collateral challenge." The Court agreed that the law enforcement exemption had been part of the Open Records Act since it became law in 1976. The Court further agreed that certainly the files were compiled for law enforcement purposes and the newspaper conceded that a RCr 11.42 motion was a possibility.

However, the Court agreed with the Court of Appeals, finding that the City's reading of the statute does not comport with the clearly expressed intent of the General Assembly. The City's position, that harm could be presumed by release, "would turn on its head the Act's basic presumption of openness." By "creating a blanket exemption for police files regardless of their contents," the Court agreed, it would "run totally counter to the General Assembly's directive that the exemptions from disclosure be 'strictly construed.'" That violates KRS 61.871 and 61.878(4), the latter which requires that any non-excepted material must be separated from that excepted and made available.

[49] 844 S.W. 2d 389 (Ky. 1992).

The Court held, instead, that "the law enforcement exemption is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when, because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." The Court did not mean that the justification must be "line by-line or document-by-document," but instead, the agency must identify the "particular kinds of records it holds and explain[] how the release of each assertedly exempt category would harm the agency in a prospective enforcement agency." It noted that the holding meant that "even if the agency adopts this generic approach it must itself identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories."

The Court further noted that Open Records cases are unique in that in most disputes, both sides have access to the facts, but in these cases, "only the agency knows what is in its records." Although in some situations, the Court can review the records in camera, in cases where the records are voluminous (in this case, as many as thirty boxes), that was possible "only to a limited extent." The Court noted that it appeared that the City had "not yet made an attempt to identify non-exempt records in its files," and without that, the law enforcement exemption could not be invoked. The Court affirmed the Court of Appeals ruling and remanded the case with instructions to give the City the opportunity to make that "required showing." (The Court agreed that prosecutor's files are, however, completely exempt.)

The City objected to the suggestion (by the Court of Appeals) that it might be required to pay attorney's fees and fines. The Court noted, however, that a "good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act" – triggering fees and fines. The initial withholding of the tapes (which were released early in the proceeding) was at most, a minor violation.

The Court ruled that the City must produce "an outline or index of its responsive records indicating meaningful classes into which they have been or might be sorted and then may explain through a custodian's affidavit or testimony how disclosure of particular records or the records in a particular class would harm a prospective enforcement action." The trial court could then, if necessary, inspect allegedly exempt records. At this point, however, the Court did not hold that sanctions were appropriate.

City of Owensboro v. Mayse, 2013 WL 4508006 (Ky. App. 2013)

FACTS: On November 21, 2011, Mayse, a reporter for the Owensboro newspaper, made a series of requests for records related to a former Owensboro PD officer (Cosgrove). Chief Skeens responded that the City had no records concerning any complaints and alleged suspension. Mayse followed up on December 1, asking for all documents related to Cosgrove's employment status from August 1 through November 18, 2011 as well as a copy of his personnel file. The City provided a copy of his letter of resignation and agreed to make available a partially redacted file (absent medical records). A week later, Mayse submitted a third request, specifically highlighting that he "was requesting any documents related to any grievance or internal

process that involved Cosgrove's employment and eventual resignation." The response indicated that any internal investigation documents were exempt and that they had nothing else responsive. Mayse appealed the denial, and the Attorney General requested the files to review in camera.

Following its review, the Attorney General asked Owensboro "for an explanation for the reason that certain forms could not properly be classified as 'complaints' or for a methodology to distinguish them from a complaint." The City's explanation for withholding two documents, entitled "Professional Standards Complaint Forms," was as follows:

> The documents you reference are not "complaints" filed against an officer. In each instance the document is the initiating document of an internal investigation that was initiated by the police department. Each bears the notation "Internal' and is signed not by a complainant, but by the officer conducting the PSU internal investigation. There was no written complaint (document) about Officer Cosgrove received by the department."

The Attorney General rejected the City's argument that the two forms were not subject to release under the ORA.[50] The City appealed the decision in Mayse's favor. The Daviess Circuit Court affirmed the Attorney General's decision, ordering the City to release the documents. It also awarded Mayse attorneys' fees and costs. Upon reconsideration, it found that the City's denial of the records, initially, was "willfully defiant" and "done in 'bad faith,'" The City appealed, but did provide Mayse with the two disputed forms.

The City moved to strike the documents, which Mayse had attached to his civil forms filed with the court, from the record – they had not been made part of the record in Daviess County.

ISSUE: Does a willful denial that records exist justify the awarding of attorneys' fees in an Open Records case?

HOLDING: Yes

DISCUSSION: The City argued that the records, prepared by a police officer rather than a third-party complainant, were exempt from public inspection under KRS 61.878(1)(i) and (j). It also argued as to whether Cosgrove's resignation was a final action and finally, whether the City acted in "bad faith" by denying the existence of the two documents.

The City argued that although they had produced the records, the matter was not moot and they still had the authority to appeal the issue as to whether the records are exempt from disclosure. The Court agreed it was proper to strike the documents and the Mayse could not refer to the content of the records for the purposes of the appeal. The Court

[50] 12-ORD-055, dated March 12, 2012.

agreed that since the City had turned over the documents, there was no "case in controversy" and the issue was moot with respect to this case.

The Court further agreed that the "City's response, on three separate occasions, that no record responsive to Mayse's request for complaints is problematic given the egis of the Open Records Act." The City further denied the records to the Attorney General. The City agreed that such action was willful. The Court upheld the award of attorneys' fees and further, remanded the matter back for additional attorneys' fees expended during the appeal.

AMICUS CURIAE FILED IN THIS CASE BY THE KENTUCKY STATE LODGE FRATERNAL ORDER OF POLICE.

EMPLOYMENT

Cummins v. City of Augusta, 2013 WL 5436657 (Ky. App. 2013)

FACTS: In December, 2010, a local resident told Cummins (Chief of Police) that an officer was "engaging in unethical, borderline-criminal, behavior." Cummins investigated and recommended the matter to the Bracken County Commonwealth Attorney, that the officer was "compromising criminal investigations and possibly engaging in official misconduct." The Mayor was copied on the information. The Commonwealth's Attorney declined to prosecute and the Mayor ordered Cummins to "cease and desist in any further investigative efforts." Cummins, however, asked the Bracken Circuit Court to convene a Grand Jury to investigate and that requested was forwarded to the Kentucky Attorney General. They declined to intervene on jurisdictional grounds.

On December 7, 2011, Cummins was terminated by the Mayor, who cited "just cause" but did not detail the reasons. Cummins sued the City and the Mayor. The Court dismissed the case in favor of the Mayor and the City, and Cummins appealed.

ISSUE: Do personnel manuals create a contractual right?

HOLDING: No (as a general rule)

DISCUSSION: Under a breach of contract claim, Cummins agreed that he had no specific employment contract. Instead, he argued that a local ordinance and personnel policies gave him contractual rights. The policies stated 1) that employees could only be fired "for just cause"; 2) that disciplinary action involving dismissal required a "pre-disciplinary hearing" by the Mayor be offered and 3) that the language in the policy and procedure manual is not a contract. Cummins argued that the personnel manual effectively modified the "at will" standard in KRS 83A.080(3) to a "just cause" standard. The Court agreed that some express provisions in a policy manual could create a contractual right, but that could be refuted by an express provision to the contrary.

With respect to a negligent supervision claim, the Court agreed that negligent supervision is a viable claim, but in this case, the court found that there was no particular harm to Cummins by the Mayor's actions. The Court did not link the termination (the harm) to the Mayor's failure to supervise the officer – and without that, a negligence action cannot hold.

The Court upheld the dismissal of the action.

JURISDICTION

McGlennen v. Com., 2013 WL 3238036 (Ky. App. 2013)

FACTS: On May 2, 2011, Deputy Osborne (Owen County SO) was contacted by Sheriff Kinman and Deputy Shaw (Carroll County SO) concerning warrants they had on McGlennen and others. He was initially to meet the Carroll County peace officers to execute the warrants in Owen County, but was called away to another emergency. Because there was no one else available to assist, the contacted Sheriff Kinman and Deputy Shawn and "requested they execute the warrants." McGlennen was located but in the course of the arrest, he escaped. He was subsequently charged with Escape 2nd. During a hearing, it was agreed that there was no interlocal agreement between the counties under KRS 65.255. As such, the question was whether the Carroll County authorities were authorized to assist under KRS 431.007(1). The trial court agreed that they were and as such, it was an escape. McGlennen took a conditional guilty plea and appealed.

ISSUE: May a local officer request the help from an out-of-county local officer?

HOLDING: Yes

DISCUSSION: The Court agreed that the request by Deputy Osborne was a valid and lawful request for assistance from the Carroll County peace officers, and was sufficient to provide them with the same powers of arrest in Owen County as they had in Carroll County. Deputy Osborne was a lawful agent of the Owen County Sheriff's Office at the time he made the request, and there was no requirement under the law that such a request be in writing. Further, because such requests are generally in "emergency circumstances, such a requirement would render the statute meaningless."

McGlennen's plea was upheld.

SIXTH CIRCUIT

CONSTRUCTIVE POSSESSION

U.S. v. Walker, 734 F.3d 451 (6th Cir. 2013)

FACTS: On November 11, 2010, Cincinnati undercover officers spotted a vehicle with heavily tinted windows, playing very loud music. They called for a marked car to pull it over. When that occurred, the four undercover officers also got out and approached it. The occupants did not roll down a window, so they knocked on the car windows. Finally, Evans (driver) and Walker (passenger) rolled down the window and spoke to the officers. The officers smelled marijuana. They saw that Walker was "agitated," and that his heart could be seen beating under his t-shirt. Evans got out without incident. When Officer Peponis asked Walker to get out, giving him specific directions as to how to do so, he saw that Walker's hands began to move out of sight, against those directions. He ignored warnings and finally the officer reached in and secured his hands. Other officers moved to help and Officer Lowry, who had opened the car's back door, behind Walker, saw a "gun on the floor of the car between the passenger's seat and the door, near the floor mounting for the front passenger's seat belt." The gun was loaded with a round in the chamber.

Since Walker was a convicted felon, he was indicted under federal law for possession of the weapon. Since the gun was manufactured in Ohio, it was critical to prove that the ammunition in the weapon came from elsewhere. An expert testified that the ammunition came from Russia.

Walker was convicted and appealed.

ISSUE: May a subject be in "constructive" possession of a weapon?

HOLDING: Yes

DISCUSSION: Walker argued that he never possessed the weapon in question. The Court agreed that it was not found in his actual possession, but noted that a "weapon is 'constructively' possessed if the government can show [Walker] 'knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.'"[51] The prosecution argued that his behavior indicated he "knew the gun was in the car and was trying to grab it." Walker contended that he did not know the gun was there.[52] The Court, however, agreed that the "quantum of evidence necessary to overcome Bailey" and prove that someone is in constructive possession of a weapon is "minimal in both the actual and constructive possession contexts."[53] The Court noted that the "line of demarcation between 'actual'

[51] U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973).
[52] U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009).
[53] U.S. v. Morrison, 594 F.3d 543 (6th Cir. 2010); U.S. v. Montague, 438 F. App'x 478 (6th Cir. 2011).

and 'constructive' possession is not analytically crisp." However, in this case, the Court agreed that the evidence established "possession, whether actual or constructive." Walker's incriminating actions, coupled with his proximity to the weapon, was enough to prove possession.

Walker's conviction was affirmed.

U.S. v. Harper / Bowdery, 2013 WL 5405469 (6th Cir. 2013)

FACTS: Harper and Bowdery were each charged with possession of a firearm by a convicted felon, as a result of their involvement with a carjacking. Each argued that they did not possess a firearm – although a firearm was found in the bedroom Bowdery shared with his girlfriend. There was evidence that Bowdery urged her to claim the firearm was hers. At trial, a witness identified Harper as the one actually holding the gun – Harper was only a few feet from that witness and made no attempt to conceal his face.

Both were convicted and appealed.

ISSUE: May two people be convicted over possession of the same gun?

HOLDING: Yes

DISCUSSION: The Court agreed that the evidence supported that each man had been possession of the same apparent gun – Harper during the actual carjacking and Bowdery by his proximity to it, at his girlfriend's home. Witnesses identified the gun as one that matched the firearm used in the robbery.

The Court upheld both convictions.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Ugochukwu, 2013 WL 5227050 (6th Cir. 2013)

FACTS: Initially, at the start of the investigation in 2009, officers "focused on the drug trafficking activities of" Sapp, who was distributing heroin in the Cleveland area. When his initial supplier dried up, he turned to two men who obtained their drugs from Ugochukwu.

During the lengthy investigation, Ugochukwu discussed with his intermediaries the quality of the heroin and other details of the trafficking. On May 24, 2010, the officers intercepted calls that discussed a meeting the next day. Ugochukwu was recorded entering a residence and leaving shortly with $300,000 in drug proceeds. Another intercepted call further involved Ugochukwu in the trafficking. Finally, in July, 2012, in a series of searches and arrests, the officers began to round up the conspirators. They went to serve an arrest warrant at Ugochukwu's home, but no one answered. Hearing

someone inside, they broke down the door and found him. A sweep confirmed he was alone. During the sweep, they saw a blender, a food sealer and packaging materials and used that information to get a search warrant.

During the search, they found heroin that had recently arrived by "body courier," money and a variety of other incriminating items. He was indicted and moved for suppression, which was denied. He was convicted and appealed.

ISSUE: Must a warrant establish a nexus between the crime and a location?

HOLDING: Yes

DISCUSSION: Ugochukwu argued that the search warrant affidavit was insufficient because it did not "contain sufficient information to establish the required nexus between his apartment and drug trafficking." He claimed that the earlier searches (of the homes of his confederates) did not link him to the conspiracy and that the items seen in plain view during his arrest were commonly found in households. The Court disagreed, finding that it was more than sufficient, providing great detail of the investigation, including the substance of the wiretaps. The officers related "the substance of an intercepted telephone conversation" between Ugochukwu and other defendants discussing heroin distribution. It incorporated by reference the criminal complaint and supporting documents, as well, the same document that supported his arrest warrant.

The Court upheld the denial of the motion to suppress.

U.S. v. Rodgers, 2013 WL 5311271 (6th Cir. 2013)

FACTS: Rodgers came under investigation by the DEA in November, 2010, after being identified by a CI as a "major drug trafficker in the Detroit area." A GPS tracking device on his vehicle indicated he frequented the area around a specific house and that his vehicle could be seen to be parked there as well.

In December, Rodgers told the CI that he was storing cocaine at that house. A warrant was used to search it while he was not present and 24 kilos of cocaine, marijuana and a gun was found. Rodgers was detained and brought to the house; he was found to be in possession of the keys to the house. He was given Miranda and admitted to where more marijuana was found. He also provided the alarm code. A search of his workplace also revealed more cocaine, in an office to which he held the only key.

Rodgers was convicted for the drugs, and appealed.

ISSUE: Does proof of a CI's reliability validate a search warrant?

HOLDING: Yes

DISCUSSION: Rodgers first argued that the search warrant used to search the home lacked sufficient probable cause. The Court noted that the CI had provided accurate information on five earlier occasions. The information was corroborated by the tracking device and actual surveillance, and his repeated visits to the home, which was not where he apparently lived. Further, his admission to having additional marijuana and his ability to tell the officers where it was hidden, provided constructive possession of those drugs, as well.

The Court upheld his conviction.

U.S. v. Jones, 2013 WL 4045973 (6th Cir. 2013)

FACTS: During the summer of 2009, Deputy Cessna (Putnam County, TN, SO) began working with Horn, a CI, to investigate Jones and Tabor. The CI, who had a criminal history and a meth addiction, told police that he had observed the pair making methamphetamine on a number of occasions, and that they used smurfs (individuals who purchase pseudoephedrine for others) to purchase pseudoephedrine. The CI made controlled buys at Cessna's direction, always being monitored by a recording device.

In August DEA agents got a search warrant for Jones's residence, based in part on the CI's information. The affidavit noted that the CI's information had been corroborated by the recordings and confirmation that the smurfs (whom the CI identified) were indeed buying pseudoephedrine. The warrant was issued. During the search, they found a number of items related to methamphetamine manufacturing and a handgun.

Jones was charged under federal law for a variety of drug offenses. He moved for suppression, which was denied. Jones was convicted and appealed.

ISSUE: Can omissions justify a Franks hearing?

HOLDING: Yes (but not in this case)

DISCUSSION: Jones argued that he was entitled to a hearing under Franks v. Delaware[54] to challenge the search warrant. To get a Franks hearing, however, the defendant "must make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and the false statement is necessary to the finding of probable cause."[55]

Jones argued that omissions from the affidavit concerning the CI made the warrant improper; the Court agreed that "omissions can be falsehoods under the Franks

[54] 438 U.S. 154 (1978). See also U.S. v. White, 401 U.S. 745 (1971).
[55] U.S. v. Poulsen, 655 F.3d 492 (6th Cir. 2011).

doctrine, but, in such cases, the defendant carries a heavier burden."[56] The credibility of an informant is important, and omission of known information may be "misleading enough to be considered a falsehood under Franks." In this case, Jones pointed to the CI's violent criminal record, his meth addiction and the fact he was being paid.

The court agreed, however, that the omitted information was not critical in this case and that it was clear that the officers did corroborate what they could from what the CI provided. The Court agreed a Franks hearing was not required in this situation.

Jones also argued that the recordings should be suppressed, because he was "subjected to an unlawful, warrantless search when the CI entered his home wearing recording devices." The court agreed that under Lewis v. U.S., it was not illegal for an undercover agent to enter and purchase drugs, at the resident's invitation.[57]

The court upheld Jones's conviction.

SEARCH & SEIZURE – CONSENT

U.S. v. Hinojosa, 2013 WL 4483523 (6th Cir. 2013)

FACTS: On January 18, 2012, Officer Wonders and Shaffer (Kalamazoo PD) were on patrol in a "high-crime, high-drug area." They observed Hinojosa, in a vehicle, parked next door to a house that "had been the site of past drug activity and neighborhood complaints." They watched him get out and walk around, move the car, and then get out and walk around again. Finally, he "walked into the house through the front door." After a minute, he came out and drove off. They followed him to another house that had several apartments and the officers knew that there had been reports of drug manufacturing in that building.

Officer Wonders approached Hinojosa's vehicle on foot, as Officer Shaffer parked nearby and got out. Officer Wonders knocked on Hinojosa's driver's side window and asked to talk to him "real quick." Hinojosa did not roll down the window but asked what he wanted. Officer Wonders stated they were investigating tips regarding suspicious activity. Upon request, Hinojosa produced an OL. Upon checking, the officer learned it was suspended and that he was on parole. Officer Wonders arrested Hinojosa. Hinojosa told the officer he had a pistol.

As Hinojosa was a felon, he was indicted for having the weapon. He moved for suppression, which was denied. The trial court found the interaction to be consensual, as the officers did leave him " a way of exiting the driveway, although the way may not have been his preferred means of exiting."

Hinojosa took a conditional guilty plea and appealed.

[56] Hale v. Kart, 396 F.3d 721 (6th Cir. 2005) (discussing omissions in a § 1983 action); see also U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006) (same in criminal appeal).
[57] 385 U.S. 206, 211 (1966). See also U.S. v. White, 401 U.S. 745 (1971).

ISSUE: Is approaching a subject on foot generally a consensual encounter?

HOLDING: Yes

DISCUSSION: The Court agreed that "none of the officers' actions during the encounter with Hinojosa prior to the arrest, either individually or collectively, amounted to a seizure, and Hinojosa's arrest instead was the result of a consensual encounter."[58] He was left with a "reasonable means of egress." The Court believed that Officer Wonders' resting of his hand on his gun was also reasonable. Hinojosa agreed to talk to him. Hinojosa "may have subjectively felt impelled – for instance by custom, courtesy, respect, or even eagerness to please" – to give his ID to Officer Wonders, but that was a request, not a command.[59]

The Court upheld Hinojosa's plea.

U.S. v. Isom, 2013 WL 5288973 (6th Cir. 2013)

FACTS: In June, 2010, Memphis PD received a complaint that Isom was selling marijuana from a home he shared with his girlfriend, Gilkey. Under surveillance, a number of people were seen to be coming and going. Isom later left. When he was caught speeding, he was stopped. Det. McDonald approached, and as he did so, "he saw Isom throw something out of the window and shove a plastic bag under the seat." He saw marijuana on Isom's clothes. Isom told him he'd been "rolling a blunt" and that he'd tossed it out. Marijuana was found under the seat.

He was taken back to his house. There, Det. Graves knocked and finally, a young girl opened the door, saying only she and her siblings were there. However, as he walked away, he spotted an adult (Gilkey) peeping through the blinds. He returned and she came to the door. He sought entry and told her they were about to tow a vehicle registered to her, that contained drugs. She agreed to him entering and signed a consent to search. They found a large amount of marijuana and elected to stop the search to obtain a warrant. With the warrant, they found a loaded handgun and more drugs.

Isom was indicted on the firearm and drug charges. He appealed.

ISSUE: Does approaching a person in the evening, at home, invalidate a consent?

HOLDING: No

DISCUSSION: The Court looked to whether Gilkey voluntarily signed the consent form. Gilkey testified that she was employed and could read. Further, the Court agreed

[58] Michigan v. Chesternut, 486 U.S. 567 (1988).
[59] U.S. v. Campbell, 486 F.3d 949 (6th Cir. 2007).

that the facts, that she was alone, with small children, at night, when the police arrived, was not enough to show coercion and that, the officers used "no threats, intimidation, or promises in exchange for consent."

The Court upheld Isom's conviction.

SEARCH & SEIZURE – TERRY

U.S. v. Davis, 2013 WL 4054919 (6th Cir. 2013)

FACTS: On April 15, 2011, Van Buren County (MI) officers "learned of a violent home invasion that left the home residents robbed and beaten by armed assailants." They took weapons and a large amount of cash. A CI provided information about suspects. Officer Ferguson (Kalamazoo PD) received a call about the whereabouts of one of the suspects, Crawford, and that he "was staying at numerous local hotels, having others use their names to rent rooms on his behalf." He reached out to the Sheriff's Office, learning they'd been able to track him to a local Red Roof Inn. Officer Ferguson met deputies there, then left to follow up on a lead at another hotel. He was called back to the Red Roof Inn, as Crawford had just been dropped off by another person, Davis. Davis appeared to be waiting for Crawford and then left that parking lot to wait in a nearby lot with a view of the hotel.

During that time, the officers were obtaining a search warrant for Crawford's room. Because they believed Crawford was dangerous, they intended to wait to execute it until he was not present. Crawford did, in fact, leave the room. Davis "flashed his lights twice in an apparent effort to signal his location to Crawford." The officers approached and Crawford ran towards Davis's vehicle. "Crawford apparently resisted arrest and caused quite a scene in the parking lot." Officer Ferguson approached Davis's vehicle, on the passenger side, with a drawn weapon. Sgt. Kelly approached on the driver's side and ordered Davis "to keep his hands visible and reached in to physically remove him from the vehicle." Davis continued to reach for his waistband and was handcuffed.

Sgt. Kelly asked, and Davis stated that he had a firearm in his waistband. The weapon was located, along with ten individual packages of crack cocaine and a razor blade. He consented to a vehicle search and a digital scale, a holster and gloves were found.

Davis, a convicted felon, was charged with possession of the firearm, along with the drugs and other related charges. Davis moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does approaching a suspected robber with drawn guns, and handcuffing him, exceed the bounds of a Terry stop?

HOLDING: Not necessarily

DISCUSSION: Davis argued that his initial detention was improper because the officers approached with drawn weapons and handcuffed him. The Court, however, agreed that "officers may take such precautions without exceeding the bounds of a Terry stop so long as those precautions are warranted by the facts.[60] The Court agreed that the facts "fully support[ed]" the officers' actions. Further, it was clear there was a connection between Crawford (tied to the robbery) and Davis. As such, the Court agreed that although they did not have substantial information linking Davis to the home invasion, they did link him to Crawford. Officer Ferguson, in fact, gave a detailed recitation of what he knew, and it clearly added up to reasonable suspicion that the driver of the vehicle was involved in the home invasion.

The Court affirmed Davis's plea.

U.S. v. Jeter, 721 F.3d 746 (6th Cir. 2013)

FACTS: On May 10, 2011, Toledo officers on patrol went to a local shopping center, relatively empty, which had been the source of many complaints of crimes occurring there. They observed a number of people gathering at the center, who were not shopping but "apparently, remaining together without any visible purpose except to be in each other's company." They observed one individual on a bicycle who "was seen on several occasions traversing back and forth across the parking lot." Officers Toth and Niles decided to address what they believed to be a "loitering problem" since they saw that no one was shopping or had any bags. Jeter was on a bicycle, but was apparently not a member of the group nor was he the person they saw earlier.

When Jeter arrived, he went into a store and purchased a snack and a bottle of water. He consumed the snack outside, placed the water on his bike and began to leave. At that same time, Officers Toth and Niles had called for additional officers to the parking lot to "saturate" the area. The officers assembled a block away to discuss strategy, to allow them to "bum rush" those who were loitering. A helicopter and ground units were position to round up stragglers.

During the approach, Officers Toth and Niles spotted a man on a bicycle (Jeter) and believed him to be the same person they'd seen earlier. They approached and Officer Niles rolled his window down and asked to speak to him. Instead, Jeter started "wandering away on his bike." They moved to prevent him from pedaling out into the street. When Officer Niles got out of the car, Jeter dropped his bike and ran. The officers gave chase, observing him "clutching the right front pocket of his shorts." He was caught and searched, and the officers found a handgun in his pocket. As he was a convicted felon, he was arrested for possession of the gun.

Jeter moved to suppress, and was denied. He took a conditional guilty plea and appealed.

[60] U.S. v. Marxen, 410 F.3d 326 (6th Cir. 2005).

ISSUE: May a subject who flees the scene of a consensual encounter be followed and seized?

HOLDING: Yes

DISCUSSION: Jeter argued that he was improperly stopped and thus, the gun should have been suppressed.

First, the Court agreed that under the facts, and particularly since Jeter was not the man earlier observed and had done business at the location, that "there was no probable cause or reasonable suspicion to detain" him. The facts indicated that "no laws were being broken or were about to be broken at the time officers converged upon him." However, his first encounter, while he was still on his bike, was not a seizure because he at most, paused briefly when the officers spoke to him. His brief pause was not a submission to authority, nor did he attempt to even talk to the officers. Instead, he "intentionally ignored the officers and their request" and did not submit.[61]

Once he ran, and was tackled, he was, of course, seized. The Court disagreed that the officers provoked his flight. The court agreed that the facts of what "constitutes a provoked flight" is "far from developed," In Illinois v. Wardlow, the Court mentioned the term unprovoked, but did not define it, or its corollary, provoked flight.[62] The court agreed that, for example, wrongdoing on the part of the officers would "make a finding of provocation more likely." In this case, the court found no evidence of fraud, or that Jeter feared imminent harm by the officers. Although the convergence of officers and vehicles might have been intimidating, "Jeter fled in a manner suggesting an attempt to escape from law enforcement." He was not just getting out of the way, he ran down an alley. There was no indication that they expected him to flee and in fact, their approach and tactics were intended to keep that from happening. In fact, no one else fled and only two officers, in one vehicle, approached Jeter specifically. Finally, he admitted he ran because he had the weapon.

The court noted: "Terry provides the framework for Jeter's seizure and Wardlow provides the justification." Flight suggests wrongdoing, although it is not dispositive of it, and Jeter's grabbing and holding his pocket gave further evidence of his possible possession of contraband.

The Court agreed the seizure was reasonable and upheld the conviction.

U.S. v. Falls, 2013 WL 3801580 (6th Cir. 2013)

FACTS: Nashville officers were dispatched to a call of "several individuals at the end of Charlie Place, a cul-de-sac in a high crime area" who were "'clicking' weapons." They found Falls there and "engaged him in conversation." He said they told him to "stop" and "come here." Officer Kahn testified that he said something like

[61] California v. Hodari D., 499 U.S. 621 (1991)
[62] 528 U.S. 119 (2000).

"Hey, how you doing"? "Do you live around here?" Falls said he stated that he lived there and pointed to his home. The officers explained the call and asked if they could frisk him, to which he agreed. They found a loaded weapon in his waistband.

Because Falls was a convicted felon, he was charged with possession of the weapon. He requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is an officer's request for a subject to do something necessarily an order?

HOLDING: No

DISCUSSION: The Court looked to whether the officer's request was an order. The officer testified that he asked Falls to stop, and that his tone of voice was normal. The officers did not show their weapons or touch Falls prior to the frisk. The Court noted that although Falls argued he felt "blocked in," that "there was no evidence that he was physically unable to leave." Under the circumstances, the Court agreed that even if the officer did use the words claimed by Falls, "without any other evidence of coercion," that "did not convert the consensual encounter into a seizure."[63]

The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE – K-9 STOP

U.S. v. Morris, 2013 WL 4017130 (6th Cir. 2013)

FACTS: In March, 2011, Morris was stopped by Michigan State Police for speeding. He consented to a search and a loaded handgun was found. In April, he sold cocaine to Dix, an informant, through VanHoose. In May, he was arrested as the passenger in a van which had been stopped for traffic offenses, his son, Corey, was the driver. In that stop, a "large brick of rubber-banded currency" was spotted in the console. That discovery led to a K-9 search of the car, which revealed cocaine, cash and a firearm. A few days later, while on bail, he was arrested again and found to be driving on a suspended OL. A vehicle search led to yet more drugs.

Morris was convicted on multiple charges, from the series of events, and appealed.

ISSUE: May information developed during a traffic stop move it into a Terry stop, to allow a delay for a drug dog to arrive?

HOLDING: Yes

[63] U.S. v. Davis, 514 F.3d 596 (6th Cir. 2008).

DISCUSSION: Morris argued that during the traffic stop in which his son was the driver, the officer "lacked reasonable suspicion to prolong the stop long enough to conduct the canine sniff." The Court agreed that in fact, the stop moved from a traffic stop, to a consensual encounter, to a Terry stop – with the last being based on the currency, Morris's prior convictions and Morris's son lying about the presence of the currency. The five minute delay in waiting for the dog was also reasonable. The Court agreed that the situation was analogous to U.S. v. Erwin.[64] Further, the Court noted, the son lacked proof of insurance and the car did not belong to either of them, which further supported the delay.

The Court upheld the conviction.

SEARCH & SEIZURE – BORDER SEARCH

U.S. v. Stewart, 729 F.3d 517 (6th Cir. 2013)

FACTS: On May 12, 2009, Steard arrived in Detroit, on a plan from Japan. He had two laptops in his possession. Officer Steigerwald (Border Patrol) randomly approached him and asked him about his passport and declaration sheet. His responses were "potentially suspicious" so he was directed to a secondary inspection area for further questioning. The officer searched one of the laptops and found images of young children, that he believed to be pornography. He called for assistance from ICE, and Agent Young told Stewart that they were "detaining his laptops for further examination." Stewart boarded a flight to Maryland.

The next day, both laptops were further searched in a cursory manner, with the examiner simply scrolling through the images. A search warrant was obtained for a more in-depth search. Images were categorized into personal, child erotica and suspected child pornography. Stewart was charged. He moved for suppression, which was ultimately denied.

Stewart was convicted and appealed.

ISSUE: Does removing an item from an airport for further examination mean that it is no longer a border search?

HOLDING: No

DISCUSSION: Stewart argued that the seizure of the laptops violated his Fourth Amendment rights. He characterized it as an "extended border search" and that the government needed at least reasonable suspicion. The prosecution argued that the initial search at the ICE office (where the laptops were taken) was merely a continuation of a routine border search. The Court looked to U.S. v. Flores-Montano, in which the Court found a border search exception, holding that "searches of people and their

[64] 155 F.3d 818 (6th Cir. 1998).

property at the borders are per se reasonable, meaning that they typically do not require a warrant, probable cause, or even reasonable suspicion."[65] Extended border searches, on the other hand, intrude more on an individual's expectation of privacy and do require additional justification. In this case, the Court ruled that "his laptop computers never cleared the border." Even though the laptops were transported some 20 miles away, the property had not yet been "cleared" for entry into the U.S. (The only reason one of the laptops was not viewed at the airport was because there was no way to power it up, its battery was dead and they could not use the foreign power cord.)

The Court noted that the laptops were never returned to him, which is a requirement for a "extended" border search, either.

The Court also noted that some of the images had been digitally manipulated to be more lascivious than they were, originally. (They were cropped and enhanced images of nude children playing on a beach.) The Court noted that under federal law, it is possible to make an originally non-lascivious photo lascivious.
Stewart's conviction was affirmed.

SEARCH & SEIZURE – MEDICAL SEARCH

U.S. v. Booker, 728 F.3d 535 (6th Cir. 2013)

FACTS: Booker was arrested by Officer Steakley, Oak Ridge (TN) PD, during a traffic stop. (He had previously been arrested by the same officer and found to be hiding 13 bags of marijuana.) His K-9 alerted near where Booker, the passenger, had been sitting. The officer patted Booker down and noted that he'd "clenched his butt[ocks] together" but felt no drugs. He did find two large wads of currency in Booker's pockets and a small amount of marijuana in the vehicle.

Booker was arrested for felony possession of marijuana, although the amount found did not warrant that arrest under Tennessee law. He was transported by another officer. As they talked at the scene, the officers noticed that Booker was trying to put his hand down the back of his pants, so they moved his handcuffed hands to the front. He tried to barricade himself in the interview room when left there alone, briefly. The officers searched the room, patted Booker down and shook his pants, trying to dislodge anything hidden. On the way to jail, Booker continued to fidget. Deputy Shelton, at the jail, agreed to strip search Booker to see if he was hiding anything, although that was not normally done. Booker was stripped and told to bend over, a small string protruded. When Shelton asked about it, Booker tried to cover the area and push the string up out of site. After another altercation, Booker was taken to the hospital covered only in a blanket, and he continued to be "squirmish." Dr. LaPaglia, at the ER, was told that it was "strongly suspected that Booker had drugs in his rectum." This was the third time that doctor had been asked over the years to do that type of search.

[65] 541 U.S. 149 (2004).

Upon arrival, Booker denied having hidden anything and he had no symptoms. Dr. LaPaglia later testified that drugs hidden in the rectum presented a serious concern because that area absorbs drugs very readily. He explained that concern to Booker, who still refused consent. LaPaglia, later testified that he decided on his own, without direction, that it was his duty to remove any drugs. He stated that Booker gave consent, although no other witnesses heard that consent. However, Booker tightened his muscles so that LaPaglia could not examine him. LaPaglia ordered a nurse to administer muscle relaxants, but Booker was still uncooperative. Finally, the nurse was directed to "administer a sedative and a paralytic agent" via IV, and intubated him. While he was paralyzed, a large rock of crack cocaine was removed and turned over for evidence.

Booker was denied suppression and was ultimately convicted. He appealed.

ISSUE: Is a forced medical recovery of drugs hidden in the body unlawful?

HOLDING: Yes

DISCUSSION: The Court agreed that LaPaglia's conduct could be attributed to the police officers who brought Booker to him.[66] Even if he consented to a digital exam, which the Court questioned, there was no evidence he consented to intubation and paralyzing drugs. Further, even if the doctor "was motivated by benevolent medical ideas, his actions … constitute medical battery."

The Court looked to the cases of Rochin v. California[67] and Winston v. Lee.[68] Under both, the Court agreed that the exam done on Booker was in violation of his Fourth Amendment rights as it was clearly an unreasonable search. In particular, Winston v. Lee indicated that the following questions must be asked to determine if a particular search was appropriate: (1) "the extent to which the procedure may threaten the safety or health of the individual," (2) "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and (3) "the community's interest in fairly and accurately determining guilt or innocence." Being subjected to unnecessary paralysis and intubation, while not extremely risky, carries at least some risk, and clearly Booker's dignity was affronted when this was done without his consent. There were other methods to determine if he was hiding anything, such as an X-ray or medical monitoring.

Further, the officers and the doctor were culpable, even if acting in subjective good faith, because a reasonable officer should have recognized the search was unlawful. The Court disregarded an argument under inevitable discovery and vacated Booker's conviction.

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[66] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) (quoting Coolidge v. New Hampshire, 403 U.S. 443 (1971)).
[67] 342 U.S. 165 (1952)
[68] 470 U.S. 753 (1985)

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Parker, 2013 WL 3746101 (6th Cir. 2013)

FACTS: On August 24, 2010, Officer Hurst (Knoxville PD) was on patrol. He observed Parker's vehicle speed and straddle the yellow line. (He approximated the speed based on his training and "the way the vehicle was moving." He also based it upon the fact that it took him nearly two blocks to catch up to the vehicle.) Parker immediately pulled over upon Officer Hurst activating his lights. Hurst later testified that after Parker pulled over, he was "making a lot of extra movements and kind of reaching under the seat and bouncing around in the, in the seat of the vehicle." He did not consider the movements normal and they made him nervous. Officer Hurst drew his weapon and had Parker put his hands out.

Officer Hurst's beat partner, who had run the plate, contacted Hurst by radio and asked if he was with Parker. Parker, who heard the transmission, agreed he was Parker. Officer Hurst went back to his cruiser to do a records check. Officer Headrick arrived to watch Parker, who had again begun to move around. He ordered Parker to stop, instead, Parker opened the door and fled. Officer Hurst spotted what he thought was a gun under his shirt and heard the "distinct sound of metal clanging" as Parker apparently dropped the weapon. He tried to pick it up, unsuccessfully. Officer Hurst found a Glock lying in the alley.

Parker was captured later. The weapon was found to have been stolen. Parker, a felon, was charged with possession of the weapon, as well as traffic offenses. He moved for suppression, arguing the officer lacked cause to stop the vehicle. The judge denied the motion. Parker was convicted and appealed.

ISSUE: Is a traffic violation enough to make a stop?

HOLDING: Yes

DISCUSSION: Parker argued that Officer Hurst lacked sufficient cause to make the stop. The Court looked to Whren v. U.S. and noted that when Officer Hurst spotted Parker commit the traffic violation, he had cause for the stop. (The Court agreed that the yellow line violation – which could be seen on the in-car video - was enough, and that it did not need to rule on the speeding question.) He was further permitted to do a records check. Once Parker fled, he abandoned the weapon and lacked any expectation of privacy in it. The Court agreed that a jury might have concluded that his driving was not reckless, because no one was put at direct risk of harm by it, but that was not the question. The Court gave credence to Officer Hurst's belief that Parker had committed an offense, which was all that was necessary.

The Court upheld the stop, which supported the admission, ultimately, of the firearm.

INTERROGATION

Norris v. Lester (Warden), 2013 WL 4516081 (6th Cir. 2013)

FACTS: On March 10, 1997, Milem was murdered in Memphis. Norris was arrested the next day, as a result of a witness identifying him as the killer. Officers "came to Norris's mother's home and took Norris, handcuffed and in the back of a squad car, to the Memphis Police Department Homicide Office to be interviewed." They did not have a warrant. He initially denied any involvement. He was booked into the jail at approximately 8:45 p.m. He was held until March 13, when he was given his Miranda warnings. He asked to speak to his mother and was allowed to call her. He then confessed and signed a written statement to that effect.

He moved for suppression, but the confession was admitted against him at trial. He appealed.

ISSUE: Is time important in determining if lengthy detention taints a subsequent confession?

HOLDING: Yes

DISCUSSION: Norris argued that his prior attorney was deficient because he failed to explore the issue of precisely how long he was held prior to giving the confession. At a state post-conviction hearing, the Court held that he'd been in custody for less than 48 hours.[69] The Court noted that "inculpatory statements that result from an illegal arrest in violation of the Fourth Amendment should be analyzed under the 'fruit of the poisonous tree' doctrine and explained the factors to be considered in deciding whether to suppress the statements." Factors to be considered are the "temporal proximity of the arrest and the [statements], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." This would serve to shift the burden of admissibility of a statement back to the prosecution.

The Court agreed that although the Sixth Circuit requires that law enforcement "listen to exculpatory witness accounts,"[70] that the "facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed … a crime."[71] The Court agreed as well, that an individual's "mere presence at a crime scene, even when combined with vague indications of motive, is not enough to establish probable cause."[72] However, the Court noted that the statement given by a witness, that placed Norris at the scene with a gun, was sufficient to justify his arrest.

[69] See Brown v. Illinois, 422 U.S. 590 (1975) – held that a confession obtained by exploitation of an illegal arrest is not admissible.
[70] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).
[71] Devenpeck v. Alford, 543 U.S. 146 (2004).
[72] Harris v. Bornhorst, 513 F.3d 503 (6th Cir. 2008).

Norris also argued that he was entitled to a "prompt probable-cause determination" pursuant to McLaughlin.[73] The earlier court proceeding held that using the time when he was booked as the arrest time "was contrary to clearly established federal law." Even though he was not formally arrested, the court held that a "person is considered seized for Fourth Amendment purposes when, under the circumstances, a reasonable person would not believe himself free to leave."[74] The fact that Norris was transported handcuffed was sufficient to show he was taken into custody for some period of time prior to his booking.. Although there were disputes as to what time that occurred, it was undisputed that he was already at the police station by no later than 7:30 p.m., which would have placed him in custody at longer than 48 hours before he confessed. The evidence suggested that he was being held to allow the police to collect more evidence, and the "record contains no alternative explanation for Norris's prolonged detention." The Court agreed that there was a "reasonable probability that the confession would have been suppressed" if the McLaughlin issue had been raised in a timely manner. The Court allowed the direct appeal to proceed on that issue.

Padgett v. Sexton, 529 Fed.Appx. 590 (6th Cir. 2013)

FACTS: In March, 2001, Smith's body was found in Putnam County, Tennessee. Padgett became a suspect and was interviewed twice. He had been given Miranda warnings and had waived them before each interview. Padgett had been initially arrested for theft and told the officers that he was sober, although he'd been drinking earlier in the day. He told the officers he was bipolar but "denied needing treatment." They later testified that he appeared normal. Padgett was charged with murder. He moved to suppress, claiming that he was incapable of having waived his Miranda rights for various reasons. His first interview lasted approximately 3 hours. He was interviewed again, three days later, and he confessed, claiming that Smith was having an affair with his (Padgett's) wife. He told one of the investigators that he had was not taking prescribed medication but that "this did not affect his understanding of their conversation." That interview lasted about 2 hours, then a break of an hour, and then another interview of an hour, at which point he confessed. With questioning, a statement was crafted, and Padgett signed it.

At the hearing, a doctor testified that Padgett was bipolar and had a history of alcohol and polysubstance abuse. His interview and confession, he asserted, was affected by withdrawal from alcohol and sleep deprivation, the interview took place during the overnight hours. Padgett claimed he didn't remember the first interview and during the second interview, he was hallucinating and thought that one of the investigators was going to throw him down a stairway.

The Court denied the motion, finding that even with his claimed mental illness, Padgett still understood what he was doing. At trial, witnesses testified that he'd told them weeks before that he planned to kill Smith. On the first day of the trial, jurors were able to see Padgett being transported to the courthouse holding cell; they had been allowed

[73] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).
[74] Michigan v. Chesternut, 486 U.S. 567 (1988).

to see the cell by a courthouse employee – it was empty at that time. The two jurors admitted later they'd discussed it with other jurors. Upon request for a mistrial, the Court offered a curative admonition, which Padgett's attorney objected to, arguing that would draw more attention to the fact that Padgett was incarcerated. It was given, however.

Padgett was convicted and appealed. When his conviction was affirmed in the Tennessee state courts, he requested a habeas corpus review.

ISSUE: Does mental illness automatically invalidate a confession?

HOLDING: No

DISCUSSION: The Court first looked at his confession, noting that "only if the 'totality of the circumstances surround the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived."[75] The Court noted that the list of factors provided by that case are not exclusive, but that it "must examine all relevant circumstances surround an interrogation to determine whether a Miranda waiver is valid." Looking at the evidence provided by both sides, the Court agreed that Padgett validly waived his Miranda rights. The Court noted that under Colorado v. Spring, a defendant need only understand "that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time."[76] Mental capacity is one factor, but not the only factor, to be considered. The testimony of the officers as to what they observed was enough to offset the expert's testimony and upheld his waiver.

With respect to the viewing, the Court agreed that a chance, inadvertent viewing by a juror of a defendant is not so prejudicial that the defendant is denied a fair trial. The instruction was enough to "cure" the error.

The Court upheld Padgett's conviction.

U.S. v. Conder, 529 Fed.Appx. 618 (6th Cir. 2013)

FACTS: On August 10, 2010, Agent Obermiller (DHS-ICE) went to Conder's Memphis home to execute a warrant, looking for evidence of child pornography. The search warrant indicated that a particular cellular phone, linked to Conder, was being used. The agents parked and went to the back door, as it appeared that was the door normally used. No one answered and they turned to return to their vehicle. About that time, Conder arrived. Agents Obermiller and Pannell asked to speak to him and they then walked back to the mobile home, where there was a porch. Other agents pulled in behind Conder's vehicle. They asked if they could speak to him inside. He agreed, upon being asked, that he was inviting all of the agents to come inside. Four agents entered.

[75] Fare v. Michael C., 442 U.S. 707 (1979).
[76] 479 U.S. 564 (1987).

Conder stated he did not have any computers or internet access at the home and offered to let them search. He denied having any pornography at all, and specifically that he had any child pornography. Conder provided his cell phone number, which matched that in the search warrant. He admitted he'd gotten images on the phone but that he had been deleting them as he received that, but also that he "had not finished deleting all of them." He refused consent to search the truck, where the phone was located, but again offered to let them search the mobile home. They produced the search warrant. One agent went to fetch the phone, while other officers searched the home. They told Conder he was not under arrest, and would not be arrested that day, they were only collecting information. He was given Miranda and admitted that he had been receiving and sending child pornography on the phone. He provided a signed statement to that effect.

Conder was charged with knowingly possessing child pornography. He moved to suppress the statements and was denied. Conder took a conditional guilty plea and appealed.

ISSUE: Are in-home custodial situations presumptively non-coercive?

HOLDING: Yes

DISCUSSION: Conder argued that the self-incriminating statements he made initially, prior to Miranda, "were the product of a custodial interrogation." The Court looked to the circumstances, and noted that "with the ultimate inquiry turning on whether a formal arrest occurred or whether there was a restraint on freedom of movement of the degree associated with a formal arrest."[77] The Court looked to other factors, such as:

> (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their requests to answer some questions.[78]

Conder argued that he was confronted by multiple officers, one had a weapon visible (although all were armed), his truck was blocked in, one of the law enforcement vehicles had a prisoner cage, he was not told he was free to go, and the agents already had a search warrant. The Court found only a few of the issues relevant, since the analysis has to be done from Conder's viewpoint and he was unaware of the warrant or, apparently, where the agents had parked their vehicles outside. For those that were

[77] U.S. v. Panak, 552 F.3d 462 (6th Cir. 2009).
[78] U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998).

relevant, the Court noted that encounters in the home are presumed to be non-custodial.[79] In Miranda, the Court had noted that "the potentially coercive police tactic of isolating suspects in unfamiliar environments solely to 'subjugate the individual to the will of his examiner.'" Even when the individual is the focus on an investigation, an in-home questioning is usually non-coercive, although certainly specific circumstances could cause it to become so. Conder's situation, specifically, fell on the side of it being non-coercive, as he admitted the agents, and that he felt free to refuse consent for them to search his truck. That indicated he understood he had freedom of action. Their failure to tell them he could refuse was a factor, but not a deciding one. The Court agreed that he was not in custody when he made the initial statements.

Further, since his argument to suppress the statements made following Miranda depends upon the statements made prior to that being held to be custodial interrogation, that argument necessarily fails.

The Court affirmed Conder's plea.

42 U.S.C. §1983 – STATE CREATED DANGER

Salyers v. City of Portsmouth, 2013 WL 4436536 (6th Cir. 2013)

FACTS: In June, 2008, Salyers, Sr. (father) gave Salyers, Jr. (son) his prescribed Methadone dose. (Salyers, Jr. was not permitted to manage his own dosage because he had previously self-medicated and had two DUIs on his record.) Some time later, Jr. left his home in Ohio, collided with another vehicle, and continued toward Portsmouth. He eventually crashed into a second vehicle. Officer Nichols (Portsmouth PD) arrived and located Jr., and matched him to the earlier hit and run report. The officer realized something was wrong with his mental state, although the officers detected no alcohol. Jr. was lucid and cooperative, however. Jr. was cited for reckless driving and handed over to another officer, from the jurisdiction where the first crash occurred. That officer also cited him and then released him. Because his vehicle had been towed, Jr. "began wandering the streets of downtown Portsmouth on foot." A few hours later, police were summoned to a man, apparently Jr., "pounding on car windows and attempting to enter a car stopped at a red light" but they could not locate him. At about 8:45 p.m., they responded to another complaint of a man throwing bricks at a parked car. Again, officers arrived too late, but soon spotted Jr. walking across a bridge between Kentucky and Ohio. The officer blocked traffic and took Jr. into custody and again, after questioning, determined him to be unimpaired.

Under Ohio law, Jr. could not be arrested for a misdemeanor as the officers had not witnessed him do anything. Officer Davis was instructed by his commanding officer to release him, just not on the bridge. He offered to drop him off someplace where he could get a ride, but Jr. stated his father was already on the way to pick him up. He was eventually dropped off on the Kentucky side of the bridge, in a large grassy area on

[79] U.S. v. Hinojosa, 606 F.3d 875 (6th Cir. 2010).

the far side of a guardrail. He was warned to stay off the highway. He then advised dispatch to inform South Shore (Ky.) police of Jr.'s presence.

About 15 minutes later, Jr. walked out into traffic and was fatally struck. Sr. filed a §1983 action against Portsmouth and named officers. (He also sued the driver who struck Jr.) The Court ruled in favor of all of the defendant officers (and the driver) and Sr. appealed.

ISSUE: Is a subject given a ride to a location they agree to, and left there, in "state custody?"

HOLDING: No

DISCUSSION: Sr. argued that the officer's action violated Jr.'s Fourteenth Amendment Due Process rights by leaving him near the highway. The Court agreed that normally, state actors (such as law enforcement officers) do not have a duty to protect individuals against "private violence."[80] The only exceptions are when the individual is in custody, or whether the actions of the officer "make the individual more vulnerable to private violence" – a "state-created danger."[81]

In this case, Sr. disavowed the state-created danger argument, basing his case on the custody requirement. The Court noted that unlike Stemler, there was no indication that Jr. "resisted [the] proposed drop-off point."[82] He specifically rejected an offer by the officer to be dropped off somewhere else. He was free to choose where he wanted to go, and the officers' call to alert Kentucky authorities did not suggest any wrongdoing. At best, it suggested the officer might have been concerned Jr. would disregard his instructions to stay off the highway or that Jr. lied about a ride. The Court found this case to be most similar to Cartwright v. City of Marine City and that the custody exception didn't apply because he was never restrained in any way.[83] And, in fact, even if the officers had a custodial duty, there was no indication that the officers breached it by showing deliberate indifference to his safety.

As such, the Court agreed that the officers were entitled to qualified immunity as they did not violate Jr.'s constitutional rights.

Walker v. Detroit Public School District, 2013 WL 4515996 (6th Cir. 2013)

FACTS: On October 16, 2008, a fight broke out at Henry Ford High School in Detroit. The school had been the location of numerous fights in the past and weapons were routinely confiscated from students. On that day, school security broke up the fight and sent the involved students back to class. After school, Morton, one of the

[80] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).
[81] Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997); Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).
[82] Id.
[83] 336 F.3d 487 (6th Cir. 2003).

students, returned and opened fire on students leaving the school. Walker was killed; several other students were injured.

Walker's estate filed suit against the students identified as the shooters, as well as the school and the security officers, under 42 U.S.C. §1983. A judgment was rendered against the shooters, but the school system and its employees were dismissed. Walker's estate appealed.

ISSUE: Is a fight in a high school a "state-created" danger?

HOLDING: No

DISCUSSION: Walker's representative argued that the school failed to respond adequately to the original fight, thereby causing a "state-created danger" that resulted in the shooting. (In addition a merger of two high schools, with rival gangs, contributed to the hazard.) The Court noted that "there is no constitutional requirement that the government must 'protect the life, liberty and property' of its citizens against invasion by private actors."[84] The Court has recognized, however, "that the government has a duty to protect an individual while the government has custody or control of that individual, or has otherwise created a special relationship that justifies a duty to protect."[85] In Kallstrom v. City of Columbus, the Court had carved out a "state created danger" exception to that general rule, in "limited circumstances."[86]

> To establish a state-created danger, the following must be proven: 1) "an affirmative act by the state which either created or increased the risk [of] … an act of violence by a third party;" 2) "special danger … wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large;" and 3) "the state knew or should have known that its actions specifically endangered the plaintiff."[87]

The Court agreed it is sometimes difficult to distinguish between an affirmative act or a failure to act. The Court noted that "when an official intervenes to protect a person, then later returns the person to 'a situation with a preexisting danger,' the intervention does not satisfy the affirmative act requirement for state-created dangers."[88] Further, the person must be placed "specifically" at risk, "as distinguished from a risk that affects the public at large."[89] In this situation, the Court agreed that neither claimed act was sufficient to claim that a "state-created danger" was in place. The violence was committed by private actors and nothing the state actors did played any part in the tragic result.

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[84] DeShaney v. Winnebago Cnty Dep't. of Soc. Servs., supra.
[85] Stemler v. City of Florence, supra.
[86] 136 F.3d 1055 (6th Cir. 1998).
[87] Koulta v. Merciez, 477 F.3d 442 (6th Cir. 2007); Jones v. Reynolds, 438 F.3d 685 (6th Cir. 2006).
[88] Bukowski v. City of Akron, 326 F.3d 702 (6th Cir. 2003).
[89] McQueen v. Beecher Cmty. Schs., 433 F.3d 460 (6th Cir. 2006).

The dismissal was upheld.

42 U.S.C. §1983 – FORCE

Chigano v. City of Knoxville (TN), 529 Fed.Appx. 753 (6th Cir. 2013)

FACTS: On January 31, 2007, M.C. (a Chigano's minor daughter), was a sophomore student with autism at Fulton High School. Cell phones at the school were required to be turned off and not visible during class, but she was caught using it by Bianucci, her teacher. The phone was confiscated and placed in the teacher's desk drawer. When M.C. tried to get it back some time later, taking it from the drawer, the teacher took the cell phone to the front office. M.C. followed Bianucci to the office, "asserting repeatedly she wanted her phone." The secretary placed it in a drawer.

At the end of the school day, M.C. went to the office, along with the teacher, stating she wanted her phone. The principal, Hatcher, told her that pursuant to school rules, it would only be released to her parent. Fields, her sister, arrived to take her home, but M.C. refused to leave without the phone. School security officers became involved, and eventually, Officer Riddle, Knoxville PD arrived. She still refused to leave and Riddle struggled with her, trying to remove her. She was handcuffed by the school security officer, assisting Riddle, and placed in his cruiser, and then taken to a juvenile detention facility. She was charged with disorderly conduct and resisting arrest, but the charges were ultimately dropped. She was released to her parents. Officer Riddle told her parents that he wouldn't have transported M.C. had he known of her autism.

The Chiganos filed suit, on behalf of M.C., alleged a race-based claim and a claim under 42 U.S.C. §1983. The District Court dismissed both claims and the Chiganos appealed.

ISSUE: Does failure to notify an officer of a child's mental disability a violation of their Fourteenth Amendment rights?

HOLDING: No

DISCUSSION: The Chigano's argued that the actions of Hatcher and Bianucci violated M.C.'s Fourteenth Amendment rights, in that they failed to inform Officer Riddle that M.C. was autistic. They claimed the school officials' actions caused her to be "physically and emotionally injured by the school security officers and Officer Riddle." The Court noted that although the "Due Process Clause prohibits the State from depriving any person of life or liberty, it does not affirmatively require the State to protect the life and liberty of its citizens against actions by private actors."[90] The Chigano's argued that in this case, the state-created-danger applies.[91] The Court noted, however, that neither of the school officials actually called the police, instead, the school secretary contacted the School Resource Officer who sent for Riddle to handle the matter.

[90] DeShaney, supra.
[91] Jones v. Reynolds, 438 F.2d 685 (6th Cir. 2006).

Finding no constitutional violation, the Court upheld the dismissal.

Lee v. City of Norwalk (OH), 529 Fed.Appx. 778 (6th Cir. 2013)

FACTS: On May 7, 2009, Officer Montana (Norwalk PD) responded to a call of a woman urinating in a hospital parking lot. He was told the woman was driving out of the parking lot in a pickup. He found the individual (Mimi Lee) in a nearly fast food place and did a traffic stop. Officer Hipp arrived. Lee explained that she was on medication that made it difficult to control her bladder. Officer Montana, seeing that her eyes were "glassy and bloodshot" and that she smelled of an alcoholic beverage, had her perform an FST. A PBT indicated her BA was 0.185, more than twice the legal limit, and she was arrested. The officers saw beer cans, open and unopened, in the truck bed. She was handcuffed and allegedly complained that they were too tight. (She subsequently alleged an injury from the cuffs.)

At the station, the cuffs were removed. She complained about the swelling and marks on her wrists, then became agitated and threw a piece of paper on the floor. She was denied permission to go to the bathroom and when she moved to do so anyway, she was grabbed by officers. She claimed, specifically, that Officer Montana choked her "for about thirteen seconds." She further claimed that he pulled her up from the floor and threw her down, while ordering another officer to OC her. (She was not, however, sprayed.) She was handcuffed again and sat in her chair, and the booking proceeded.

Following her release, she went to seek medical treatment for her wrists, receiving a splint and medication. Ultimately she had surgery for carpal tunnel problems. Lee (and her husband) filed suit, claiming excessive force and related state claims. The officers were granted qualified immunity and the cases dismissed. The Lees appealed.

ISSUE: Is a brief handcuffing excessive force?

HOLDING: No

DISCUSSION: The Court noted that she could not prove that the handcuffing caused her issue, nor that the brief delay (following her alleged complaint and the complete removal of the cuffs) constituted excessive force. The drive from the arrest site to the station was only a few minutes, as it was only 1.5 miles apart. In Fettes v. Hendershot, the Court agreed that there was no "constitutional requirement obligating officers to stop and investigate each and every utterance of discomfort."[92]

With respect to the station encounter, the Court agreed that "the video recording of the booking process contradicted Lee's allegations and showed that each officer acted reasonably under the circumstances." Officer Montana's actions, for example, "were instead reasonable police procedures for handling a belligerent and aggressively resistant arrestee." The Court agreed that "although ordinarily the plaintiffs' version of

[92] 375 F.App'x 528 (6th Cir. 2010).

the facts must be accepted as true when deciding the defendant's motion for summary judgment, a video that contradicts a nonmovant's version of the facts can support a grant of summary judgment."[93] The video clearly showed that the "Lees' characterization of the officers' actions as a 'vicious assault' [was] not accurate." Although Officer Montana maintained some kind of a neck hold, "Lee was kicking and struggling during that time, she was not 'limp' and compliant as she claims." The video also showed that as soon as Lee was subdued and handcuffed, all force against her stopped. Although the officer "may not have used the minimum amount of force necessary to subdue Lee, the video shows that the force Officer Montana used was not constitutionally excessive."

The Court upheld the decision in favor of all of the officers.

Jones v. City of Cincinnati, 507 Fed.Appx. 463 (6th Cir. 2013)

FACTS: On November 30, 2003, Cincinnati police and firefighters responded to a disorderly person in a restaurant parking lot. Officers Pike and Osterman found Jones "marching, squatting, and shouting profanities outside." Jones weighed 348 pounds and was 5'11. Pike called dispatch, stating that Jones might be violent and requesting a mental health response team. He also turned on the video in his vehicle, but part of the subsequent encounter was obstructed by the car's hood. As described by the Court:

> At some point, Jones lunges at Pike and throws a punch. Officer Osterman tackles Jones and all three go to the ground. They shout at him to put his hands behind his back but he does not comply, instead "struggles aggressively." The officers jab and strike Jones with batons. At some point Jones grabbed Osterman's neck and reached for his waist area, and also held onto Pike's baton for some seconds. The struggle continues and Officer Slade arrives – he uses OC. More officers arrive and they try to get him handcuffed. Jones can be heard moaning. After another loud moan, he falls silence. Some ten seconds later, one officer asks about rolling him. They finally get him cuffed and some seconds later, the same officer again asks about rolling him. They call for the firefighters and star rolling him over. Officer Pike checks his breathing and again calls for the firefighters, only then noticing that they had left. They call for dispatch to get them back to the scene.
>
> They continue to check on him, but get no response. One officer notes that he has a pulse but they don't see him breathing. One officer does a sternum rub and he is turned to his side. The firefighters arrive and begin CPR. He was pronounced dead 35 minutes later. His death was attributed to "abnormal cardiac rhythms resulting from a violent struggle and positional asphyxia."

The Court denied immunity, finding in part that because the officers struck him so quickly, with barely a pause between strikes, that Jones was not given a chance to

[93] Scott v. Harris, 550 U.S. 372 (2007); Marvin v. City of Taylor, 509 F.3d 234 (6th Cir. 2007).

comply. Further, it noted at least one officer understood that his position was a problem. The officers appealed.

ISSUE: Is using force against an aggressive subject reasonable?

HOLDING: Yes

DISCUSSION: The officers argued that "under the rapidly evolving circumstances of that morning, they did not act unreasonably in using their batons to strike and jab Jones." The Court agreed, finding Jones to be the primary aggressor, refusing to comply with orders. The strikes, the Court agreed, were all to non-critical areas of the body. Even assuming Jones began to struggle to breathe during the fight, the Court agreed that the officers "could not have discerned whether Jones resisted in an attempt to breathe or in defiance of commands."

A secondary issue was the officers' refusal to unhandcuff Jones when requested to do so by the firefighters. The officer testified that he did not do so "because putting them on was difficult, and he did not know if Jones was feigning injury." The officer's subjective motivations were useful to the Court to understand "what an objectively reasonable officers would have done under the circumstances." There was no indication the officers understood that CPR would be difficult or less effective with the handcuffs on, and apparently they did, in fact, do CPR. Finally, the 64 second delay in rolling him did not show a deliberate indifference to his medical needs. When they realized he was in distress, they immediately sought help for him.

The Court reversed the denial of summary judgment.

<u>Eldridge v. City of Warren</u>, 2013 WL 3968761 (6th Cir. 2013)

FACTS: On June 18, 2009, Warren (MI) PD got a call about erratic, possibly drunk, driving. Officers Moore and Horlocker responded and found the "truck parked behind the barricades it had knocked over" with the motor running. Eldridge, the driver, "muttered something inaudible" to the officers' questioning. Officer Moore was able to get the car door open, turn off the ignition and remove the key. The officers continued shouting, trying to get him to get out, but he was unresponsive to their commands - instead, he kept saying "I'm fine." Officer Horlocker got the passenger door open as they continued to try to get Eldridge to get out.

The officer's commands had "little effect." Finally, "stymied by the seemingly uncooperative Eldridge" Moore began to tug at his arm and threatened to use a Taser. Both officers began pulling on him as the commands got louder. Two minutes and 9 seconds into the situation, Officer Moore tased Eldridge, causing him "to thrash about erratically." He was finally extracted, grabbed and "pinned … to the side of his car." He was still slow to comply with commands to get on the ground and was finally pushed by the officers into a prone position. "Moore placed his knee at Eldridge's neck,

causing Eldridge to hit his head on the pavement. They searched him after handcuffing and discovered that he was wearing an insulin pump.

"Eldridge was a diabetic. He was suffering from a hypoglycemic episode."

Eldridge sued under 42 U.S.C. §1983, claiming excessive force. Moore and Horlocker requested summary judgment. The trial court granted it on a claim of deliberate indifference to medical needs but not on the excessive force claim. The officers appealed.

ISSUE: Is using a Taser against an impaired subject, who is not actively resisting, lawful?

HOLDING: No

DISCUSSION: The Court looked at the situations under the lens of Ciminillo v. Streicher, which provided "three guideposts:" "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[94] In this case, although DUI is certainly serious, it was not so under the current context. Since Moore had the keys, clearly, "Eldridge was going nowhere." Once the vehicle was turned off, he posted little risk to anyone, the public nor the officers. His polite responses indicated he could not get out of the vehicle. He was apparently of approximately equal size to the two officers.

The Court noted that the "true flashpoint of this controversy" was whether he was actively resisting. To the officers, he appeared "noncompliant and therefore actively resisting." However, the Court noted, the "facts demonstrate that Eldridge was not actively resisting, and under our precedent it is unreasonable to tase a nonresisting suspect."[95] It was disputed whether Eldridge was, in fact, holding onto the steering wheel as the officers tried to extract him. The Court noted that in other cases of precedent, the subject was involved in "some outward manifestation – either verbal or physical" of active resistance. The Court looked in particular to Foos v. City of Delaware, in which the vehicle was still running and being revved, and reacted violently to a vehicle's window being broken by the officers.[96] Eldridge, instead, was "without reaction, exhibiting neither hostility nor belligerence."

Finding a common thread in the caselaw to date, the Court noted that "noncompliance alone does not indicate active resistance, there must be something more." It can be verbal or physical. In this case, the interaction did "not follow the typical course of active resistance." The vehicle was disabled without incident, and the only persons "conveying any sense of aggression were the two officers." This did not justify the use of a Taser.

[94] See also Graham v. Connor, 490 U.S. 386 (1989).
[95] Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505 (6th Cir. 2012).
[96] 492 F. App'x 582 (6th Cir. 2012).

The Court agreed that the law was clearly established. It further ruled that Moore's use of his knee to keep Eldridge pinned was unwarranted, because the video demonstrated "that he was attempting to comply with the officers' request" and simply could not, for medical reasons.

The Court affirmed the denial of summary judgment.

Wells v. City of Dearborn Heights (MI) 2013 WL 4504759 (6th Cir. 2013)

FACTS: On February 12, 2008, Dearborn Heights officer served a search warrant on Wells's home. Officers Mueller, Ciochon and Pellerito "took Wells to the ground, handcuffed him, and tased him." During that time, Wells' dog was also shot. There was dispute with respect to the order of the events, however, with Officer Mueller stating that he tased Wells before he was handcuffed. Wells claimed that a physical disability prevented him from immediately going to the ground as ordered. Wells admitted that he was trying to turn around to see what had happened when the dog was shot, thinking that in fact, his father, who was also present, had been shot instead. Marijuana and methadone were found during the search and Wells later pled guilty to possession of marijuana.

Wells then filed suit for excessive force against a number of parties, after further court action, only the three officers directly involved and the City remained as parties. They were granted summary judgment and Wells appealed.

ISSUE: Is using a Taser against a handcuffed subject unlawful?

HOLDING: Yes

DISCUSSION: The Court looked at each assertion by Wells, against Mueller. The court agreed that "kneeing Wells to the ground" as Wells agreed was done, was objectively reasonable under the need to detain the occupants, even if Wells's slow response was due, in hindsight, to a physical disability.

However, the Court agreed that, taking Wells's story as true (as required at this stage of the litigation) meant that Mueller did use excessive force by tasing him. Even if he was cursing and struggling, the Court agreed that using such force was inappropriate in the face of passive resistance.[97] It is "especially true when the suspect is already handcuffed."[98] There was no indication Wells "posed a safety threat or a flight risk."[99]

The court agreed the Mueller was not entitled to summary judgment on the Taser claim. The Court also looked at claims against Ciochon and Pellerito for failing to stop Mueller

[97] Meirthew v. Amore, 417 F. App'x 494 (6th Cir. 2011).
[98] Michaels v. City of Vermillion, 539 F. Supp. 2d. 975 (N.D. Ohio 2008).
[99] See Austin v. Redford Twp. Police Dep't, 690 F.3d 490 (6th Cir. 2012).

from tasing Wells. The Court noted that the events "occurred rapidly" and that they could have nothing to intervene.[100]

Further, because the Court reversed the summary judgment related to the tasing, it also reversed the trial court's decision that Mueller's actions did not violate Michigan law, either. In addition, claims against the city were also reinstated and the case remanded for further proceedings.

42 U.S.C. §1983 – BRADY

Provience v. City of Detroit, 529 Fed.Appx. 661 (6th Cir. 2013)

FACTS: On March 24, 2000, Hunter was murdered in Detroit. Witnesses described what had occurred. A month later, Irving was murdered, apparently for planning to tell the police that Sorrell and Antrimone Mosley had killed Hunter. Sgt. Moore (Detroit PD) was in charge of the investigation, a progress note indicated that the two murders were connected and identifying Sutherland as another witness. Two weeks later, Sutherland was murdered.

A few months later, Wiley was arrested for several burglaries. He told police that Provience was the shooter and that his brothers drove the getaway car. Much of his information, however, contradicted what other witnesses had said about the vehicle used and what had occurred. Provience was arrested, along with his brother. The progress note was not turned over in discovery. Provience's brother was acquitted, but Provience was convicted of murder 2nd. Wiley testified, but Provience was not told that he'd been given a plea deal.

In 2002, Woods confessed to Irving's murder and implicated the Mosleys in Hunter's murder. Woods' confession was not provided to Provience, who was appealing his case at the time. As a result of an investigation by the Innocence Project, however, Provience's conviction was vacated.

Provience filed sued under 42 U.S.C. §1983 against Moore, arguing that he'd violated Brady by not sharing the progress note. Moore's motion for qualified immunity was denied, with the court finding genuine issues of material fact, and specifically, whether the information Moore provided to get the arrest warrant was false. Moore appealed.

ISSUE: May withholding material evidence subject a law enforcement officer to lawsuit?

HOLDING: Yes

DISCUSSION: Under Brady, the Court held that withholding material exculpatory evidence could result in liability on the part of law enforcement.[101] Provience

[100] See Floyd v. City of Detroit, 518 F.3d 398 (6th Cir. 2008) Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982), Ontha v. Rutherford Cnty., Tenn., 222 F. App'x 498 (6th Cir. 2007).

demonstrated that "the evidence at issue is favorable to him as exculpatory or impeaching, that the evidence was suppressed, and that he was prejudiced by the suppression." The progress note supported a "viable alternative theory of the crime," and showed a connection between the three homicides. (This cast doubt on the prosecution's theory, that Provience's murder of Hunter was "over an isolated drug territory dispute.") It was less clear that some of the other disputed evidence would be Brady material, however.

The Court agreed, however, that Moore was entitled to qualified immunity for his decision to arrest, based on Wiley's testimony. At most, he was negligent in relying on Wiley's statement. An officer does not have to investigate every claim of innocence but only "consider the totality of the circumstances."[102]

The Court agreed that summary judgment in favor of Moore was properly denied on the Brady claim, alone.

42 U.S.C. §1983 - ARREST

Romo v. Largen, 723 F.3d 670 (6th Cir. 2013)

FACTS: On November 6, 2010, Romo met relatives at a bar. One was designated as the driver and they visited several bars through the evening. Romo was dropped back off at his truck, with the intention being to sleep in it. To ensure Romo would not drive, his brother took the keys. Romo was awakened some time later by Officer Largen. Largen asked him a number of questions, including asking if Romo knew why he'd been pulled over. Romo responded that "the officer did not pull him over because he was not driving." (The officer had apparently seen a similar vehicle a few minutes earlier, pass a semi on railroad tracks.) Romo failed FSTs and was arrested. He repeatedly denied having been driving or that he even had the keys.

At trial, the officer's report varied somewhat from his testimony. Although never specifically stated, presumable Romo was not convicted. He filed suit under §1983 for false arrest and related claims. Largen claimed qualified immunity and was denied. He then appealed.

ISSUE: Does a reasonable explanation negate probable cause for an arrest?

HOLDING: Yes

DISCUSSION: The District Court explored several possibilities, ranging from a complete fabrication by the officer to a scenario in which he told the truth, but was mistaken about the truck. The Court, however, agreed that since there was a "genuine dispute of material fact," summary judgment in favor of the officer was improper. The

[101] Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009).
[102] Gardenhire v. Schubert, 205 F.3d 303(6th Cir. 2000).

Court agreed that "no reasonable officer would believe that he could constitutionally arrest a person found sleeping in a truck and take that person to jail for drunk driving, particularly after the person offers a cogent explanation for sleeping in the truck and shows that he does not even have the truck's keys." It was certainly appropriate for the officer to investigate the situation, but his explanation "should have dispelled those suspicions." The Court agreed that drunk driving is a serious danger, but "they need more than presence in the driver's seat of a vehicle for probable cause."

The court reversed the denial of qualified immunity with respect to the federal malicious prosecution claim – but otherwise affirmed the decision.

42 U.S.C. §1983 – SEARCH & SEIZURE

Lucaj (Victor and Megann) v. Taylor, 2013 WL 4729576 (6th Cir. 2013)

FACTS: In April 2009, Victor Lucaj discovered three potted marijuana plants on his property. He contacted the Taylor police and ask that they remove the plants. Officer Shewchuk was dispatched to handle it. He was asked to park a few houses down as Victor feared retaliation. Officer Starzec spotted the call on her computer and "improperly categorized it as a narcotics investigation." She called Officer Kantz and left her a voice mail, indicating incorrectly that the Lucaj's neighbor was the complaining party. No officers ever responded to the Lucaj house, however, apparently Shewchuck was cancelled on the call.

The next day, Megann Lucaj told her brother, Banks, about the plants. He contacted a friend at the PD, who passed on the information to Sgt. Neal. That same day, Officer Kantz went to the neighborhood to do surveillance. Seeing the plants, she got a search warrant. However, she "failed to follow established department procedures which likely would have revealed that it was the Lucajs themselves that reported the marijuana plants." It incorrectly stated that the investigation was based on an anonymous tip from a neighbor. While Kantz was getting the warrant, Sgts. Neal and Martin went to the Lucaj home and removed the plants. Shortly after that, Kantz sent a "deconfliction form" to other agencies to alert them that Kantz would be serving the warrant, but specifically did not notify other members of her own department (including the Special Operations Department of which Sgt. Neal was a part).

The Downriver Area Narcotics Organization (DRANO) arrived at the Lucaj house and saw that the plants were no longer in the backyard. A neighbor reported that "men dressed in plain clothes" had taken the plants. They knocked and announced, but Megann was in the bathroom and did not respond immediately. The team forced entry. Megann was taken to the floor and frisked. She told the team what had occurred and that her husband had the business card of the officers who had just left. They got the card, talked to Neal and confirmed that he'd taken the plants. At some point, Officers Corne and Starzec had conducted a K-9 sweep of the property, although there was dispute as to when, precisely, that occurred.

The Lucajs sued the City of Taylor and several officers. The District Court denied the motion for summary judgment on the basis of qualified immunity for Starzec and Corne, and they appealed.

ISSUE: Is timing of events during a search critical in determining possible misconduct?

HOLDING: Yes

DISCUSSION: The case against Starzec and Corne focused on when the K-9 sweep occurred, whether it was before or after they "knew or should have known that the search was in error or had been called off." The Lucajs argued that "Kantz relayed the information from Neal 'to the other officers in her presence' and that 'the search was called off at that point.'" However, she did not contend, specifically, "that Starzec and Corne were in Kantz's presence when the information was relayed." Megann was not able to recall if Lt. Pizana, who was also present, actually "told all of the officers to end the search and leave" prior to the search. She did recall Corne asking her if she had a cat, however.

The Court agreed that "no reasonable jury could find that Starzec and Corne knew or should have known that the search was erroneous prior to conducting the K-9 sweep," and as such, the officers were entitled to summary judgment. The Court reversed the denial.

42 U.S.C. §1983 - HECK

Gottage v. Rood, Latour, Notorlano and Periate, 2013 WL 4034417 (6th Cir. 2013)

FACTS: On June 4, 2008, Gottage, having spent several days drinking and taking Vicodin, fired a shotgun into the ground beside his father's home. He then entered the house and pointed the weapon at Muysenberg, his nephew; Muysenberg called the police. He later provided two written statements.

The first responding officers talked to Gottage through a bathroom window, while Gottage was showering. He refused to let them in, stating they would need a warrant. He later stated that he passed out. Emergency response team officers arrived and tried to make contact with Gottage, to no avail. A neighbor, Labeau, told him that when he passed out, Gottage could not be awakened. He offered to go inside and get Gottage, as he had a key. However, instead, the officers fired tear gas inside, which awakened Gottage, who came out with his hands up. He was ordered to get down, but there wasn't enough room on the porch to do so, so he moved toward the porch step. He was tackled by Officers Rood, LaTour and Notorlano and taken face first into the concrete. Labeau also testified that the officers "mashed" Gottage's face into the cement and that a large bloodstain remained in the driveway. Gottage had a broken nose, injuries to his arm and shoulder, two black eyes and various cuts and bruises. The officers testified that Gottage refused directives and that "tackling him was thus

necessary and appropriate," with Gottage contending that "he was not given time to comply." Labeau supported Gottage's claim that he said nothing and did not resist.

Gottage filed suit against the officers, under 42 U.S.C. §1983, claiming excessive force. The officers claimed immunity and were denied. They appealed.

ISSUE: Is a claim for excessive force necessarily negated by a resisting arrest conviction?

HOLDING: No

DISCUSSION: The District Court ruled that it only had jurisdiction over the issue of "whether Gottage's plea of no contest to resisting and obstructing arrest forecloses his excessive-force claim." (The officers' refusal to concede to Gottage's recitation of the facts precluded consideration of any other assertions in the appeal.)

The officers, however, asserted that since Gottage pled no-contest to resisting arrest, he could not file suit for excessive force. The Court agreed that under Schreiber v. Moe[103] and Karttunen v. Clark[104] a claim for excessive force was not necessarily negated by a resisting arrest conviction under Heck v. Humphrey.[105] The Court agreed that Gottage could bring the lawsuit even though he took a plea essentially admitting guilt to resisting arrest.

The Court affirmed the denial of summary judgment on the officers' behalf.

42 U.S.C. §1983 – PROOF

Burley v. Gagacki (and others), 729 F.3d 610 (6th Cir. 2013)

FACTS: On June 13, 2007, "masked law enforcement agents, dressed in black, with guns drawn, broke into a home" in Detroit. They allegedly "assaulted and terrorized" Geraldine and Caroline Burley. They refused to identify themselves by name, only giving the women the identifier of "Team 11."

The women filed suit for excessive force and violations of the Fourth Amendment. The identities of the officers became the "central focus of the litigation" – as they "intentionally concealed their identities and the raid was part of a vast multi-law enforcement operation involving Wayne County, and federal, state, and municipal law enforcement agents." The trial judge dismissed Wayne County and any state and local officers, but allowed the case to go to trial against federal agents. The judge then granted judgment at the close of the plaintiff's case, essentially directing a verdict in favor of the defendants, also awarding them costs. The plaintiffs were required to post bond and they appealed.

[103] 596 F.3d 323 (2010).
[104] 369 F. App'x 705 (6th Cir.2010).
[105] 512 U.S. 477 (1994).

ISSUE: Does concealment of identity during a raid shift the burden to officers to show who was, in fact, present?

HOLDING: Yes

DISCUSSION: The Court held that the judgment was error "because genuine issues of material fact exist" with respect to who was actually present at the scene. It directed the trial court specifically to "consider whether the circumstances of this case, which include an intentional concealment of identity, coupled with an 'I wasn't there' defense, warrants shifting the burden of production onto the federal agents to establish their lack of involvement." The plaintiffs had requested the names of the officers and had, after two years, received a report identifying six federal and two local officers; they promptly amended their complaint when they received it. (There was some confusion because another report indicated the same team executed a warrant on another property, at the same time, but the federal defendants named never affirmatively asserted that they were not involved in the Burley raid until their depositions, after the statute of limitations had run.) Each of the plaintiffs, individually, had testified that they recognized certain of the agents' voices.

The women argued that by failing to respond completely to interrogatories as to whether they denied the allegations, that the defendants defaulted on using the defense that they were not present. (However, the plaintiffs did not file a motion to compel discovery, either.) The Court agreed that in a Bivens' action, it was necessary to "identify with particularity the federal officer who engaged in the alleged misconduct because a federal officer 'is only liable for his or her own misconduct.'"[106] The Court agreed that the record contained sufficient evidence that the federal defendant officers, collectively, "were the individuals who entered [the] home and engaged in the use of excessive force" in light of the voice recognition testimony. The Court agreed that "although there may be reasons to discount Geraldine Burley's voice-recognition testimony, the decision should have been left to the jury." If it could be shown that Gagnacki was part of the entry team, then a jury could infer that the other federal agents were also present and involved.

The Count concluded:

> [W]e are not inclined to shield the federal defendants from liability as a reward for their unethical refusal to identify themselves by name and badge number. There is no dispute that the raid of plaintiffs' residence occurred. Moreover, plaintiffs' inability to identify the officers who entered their home is the consequence of the agents' conduct – the officers wore black clothing and face masks, with the intent to conceal their identities, and refused to provide their names when asked. Significantly, the federal defendants' names are listed on the report of investigation as the parties who executed the search warrant at their residence. Although an officer's mere presence at the scene of a search is insufficient to

[106] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

establish individual liability under 1983, here the agents' intent to conceal contributed to plaintiffs' impaired ability to identify them.

The Court agreed that shifting the burden to the defendants, in this type of situation, was appropriate and "prevent[s] this exact scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire." It vacated the judgment in favor of the federal defendants (as well as the order to pay costs and the bond).

The Court also reviewed the summary judgment in favor of Wayne County. The Court agreed that "'a municipality can be liable under 42 U.S.C. §1983 only if the plaintiff can demonstrate that his civil rights have been violated as a direct result of that municipality's polity or custom'" or "failure to train amounts to deliberate indifference' to such rights."[107] In this case, Wayne County had allowed one of its officers to be deputized as a federal drug enforcement agent and referred all inquiries about the raid to the DEA. However, because the one identified local officer (Gagacki) was working for the DEA at the time, the liability, if any, fell to the DEA, as they would also be responsible for training and supervising that officer. Further, the evidence indicated that the DEA had their own entry team and any local or state officers at the scene served only as perimeter security. As "mere presence at the scene" is not enough to place liability on an officer, without something more, the Court agreed that the proof was insufficient to place any responsibility on local officers.[108] The Court further agreed that "failure to intervene" was also not a viable argument in this case, because there was no proof that the local officers were involved in the use of force. It affirmed the decision in favor of Wayne County.

TRIAL PROCEDURE / EVIDENCE - HEARSAY

U.S. v. Nelson, 725 F.3d 615 (6th Cir. 2013)

FACTS: On June 15, 2009, Officers Meredith and Massey (Murfreesboro, TN) were dispatched to an anonymous 911 call about a "black man wearing a blue shirt, with a 'poofy' afro, riding a bicycle, was armed with a pistol." Officer Meredith, arriving first, found Nelso, who "precisely matched this description." As the officer started to get out of the car, Nelson rode away. Officer Meredith shouted at him but he continued on. Officer Massey, still in his vehicle, followed and saw as nelson tossed a "large, heavy object" into nearby bushes. Nelson abandoned his bike and fled on foot, but he was quickly apprehended. (The above sequence took place in approximately one minute.)

Nelson was arrested and two bullets were found during a search. A loaded handgun was found where Officer Massey saw him toss and object. As Nelson was a felon, he was charged with possession of the weapon. Prior to the trial, he moved to have "any testimony regarding the 911 caller's description" suppressed on the grounds that it was

[107] Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004).
[108] Ghandi v. Police Dep't of Detroit, 747 F.2d 338 (6th Cir. 1984).

"inadmissible hearsay." The motion was denied and he was convicted at trial. He appealed.

ISSUE: Is hearsay usually inadmissible?

HOLDING: Yes

DISCUSSION: Although the Court agreed that the officer had sufficient reason to believe Nelson was in possession of the weapon, the Court noted that the testimony of five officers, total, "based on an anonymous, out-of-court declarant's observations," was not necessary to provide the jury with the reason for the officers' actions. The "hearsay evidence should not have been admitted." Since none of the officers saw him with the gun before he tossed it, the testimony was "effectively offered to prove the truth of the statements made, rather than to show background," making it hearsay. Instead, a "less-detailed statement indicating that the police received a 911 calls," would have avoided the problem. The court noted that the details were not needed to explain that it was a lawful stop to the jury.

The Court agreed that the information was not harmless and likely materially affected the ultimate verdict. Further, the hearsay evidence "went to the very heart of the sole disputed issue for the jury's resolution, namely, whether Nelson possessed a gun."

The Court reversed his conviction.

TRIAL PROCEDURE /EVIDENCE - TESTIMONY

U.S. v. Perales, 2013 WL 4529509 (6th Cir. 2013)

FACTS: On October 3, 2011, Beasley entered a Wooster, Ohio, bank and handed the teller a note requested $5,000 in large bills. Beasley was given $2500 and fled. A similar robbery occurred a week later in Toledo, but that time, the robber fled without getting any money. 36 minutes later, she robbed a bank in Millbury, 8 miles away, getting $3350. A vehicle was spotted picking her up and information was relayed to local law enforcement.

Perales, driving a vehicle fitting the description, was stopped, and Beasley was found hiding in the back seat. Clothing matching what was worn during the robberies was found, along with money and a hold-up note. Perales was carrying a motel key.

Beasley pled guilty to two bank robberies, Perales went to trial for aiding and abetting and was convicted. He appealed.

ISSUE: Is an out of court identification admissible if the witness is present?

HOLDING: Yes

DISCUSSION: Among other issues, Perales challenged the admission of an FBI agent's testimony about a motel employee who made an out-of-court identification of Perales as the man staying at the motel. The clerk did not identify Perales in the courtroom but the agent confirmed that when he showed the clerk a photo of Perales, the clerk identified him, just a week before the trial. The Court agreed it was admissible non-hearsay because the clerk was available at trial for cross-examination.

The Court upheld Perales's conviction.

CHILD PORNOGRAPHY

U.S. v. Vanderwal, 2013 WL 3746103 (6th Cir. 2013)

FACTS: Postal inspectors identified Vanderwal's address in records seized during a raid of an Ohio company involved in child pornography. They contacted Vanderwal and "offered him the opportunity to purchase child pornography." He agreed and requested four DVDs by name. The Postal Inspection Service obtained a search warrant and executed it on December 7, 2010. The search revealed 914 videos and over 5,000 still images of child pornography. They specifically located a VHS tape of two pre-pubescent girls, naked in his bathroom, clearly made by a camera placed in the bathroom. The girls were the daughters of a family friend and he was a frequent babysitter. The found additional items of evidence, as well.

Vanderwal was charged with a variety of offenses under federal law, involving child exploitation and pornography. He was convicted and appealed.

ISSUE: Is the intent to create sexual explicit videos of children unlawful, even if not completed?

HOLDING: Yes

DISCUSSION: The Court looked at whether the visual depiction of the two girls in the video qualified as "sexually explicit conduct."[109] The Court noted that he was charged with *attempted* sexual exploitation of a minor, not the completed offense. As such, the Court agreed that it was "not necessary for the Government to prove that the videos Vanderwal created were lascivious, only that he had the specific intent to create a lascivious video." He argued that there was no evidence he attempted to have the girls engage in any sexually explicit behavior, but the Court looked to other items he had in his possession, and the fact that the camera position was intended to focus on the genital area of someone standing at the sink. He also had a clear plastic shower curtain in the bathtub, suggesting that the children could be viewed naked through the plastic.

The Court affirmed his conviction.

[109] 18 U.S.C. 2256(2)(A).

U.S. v. Wright, 529 Fed.Appx. 553 (6th Cir. 2013)

FACTS: Wright was convicted of trafficking in child pornography, a large number of illegal images having been found on his computer. One of his conditions of supervised release was that he could not use a computer without the permission of his probation officer. He objected to the scope of that restriction, although he pled guilty to the underlying offense. The trial court upheld the restrictions and Wright appealed.

ISSUE: Is a restriction on Internet use reasonable for child pornography defendants?

HOLDING: Yes

DISCUSSION: The Court (and Wright) agreed that this condition is a common one for those convicted of child pornography. The Court agreed that some of these restrictions are problematic since often, one of the conditions is obtaining training/education, and "computers in the work setting are ubiquitous." The Court looked to U.S. v. Lantz, in which it acknowledged "there appears to be a consensus that internet bans are unreasonably broad for defendants who possess or distribute child pornography, but not those who use the internet to 'initiate or facilitate the victimization of children.'"[110] The Court agreed that a complete ban wasn't necessarily appropriate for someone who was only a "consumer of child pornography," but also noted that this was not a complete ban, but instead a reasonable restriction for which he simply had to seek approval of his probation officer.

The Court upheld the restriction.

EMPLOYMENT – KENTUCKY STATE INTERPRETATION

Reeves v. City of Georgetown (Ky), 2013 WL 4859654 (6th Cir. 2013)

FACTS: From 2004 until February 2, 2012, Reeves was the police chief of Georgetown. He was fired by the mayor without notice or a hearing. Reeves argued that the termination violated a city ordinance and that he could only be fired by the City Council for cause. The case was removed to federal court by the City and the District Court dismissed the action, ruling that KRS 83.130 gave the mayor the power to hire and fire employees and that the power had not been transferred by law to the city council. The Court agreed that "Reeves could not show that he had a protected property interest in his public employment and thus could not state a claim for violation of his substantive due process rights or breach of contract."

Reeves appealed.

ISSUE: May a federal court interpret a state law?

[110] 443 F. App'x 135 (6th Cir. 2011).

HOLDING: Yes

DISCUSSON: In cases where the federal court is involved in an interpretation of state law, it must look to rulings of the state's highest appellate court. All parties agreed that KRS 83A is valid and the Court agreed that the statute gave the mayor the ability to hire and fire all employees. Instead, the Court noted, that ordinance, which appeared to cede such power to the City Council, simply "set forth another option for a valid termination of the chief of police by the city council." The Court agreed that he was properly terminated by the mayor and affirmed the District Court's ruling.

WIRETAPPING

U.S. v. Nagi, 2013 WL 5433464 (6th Cir. 2013)

FACTS: Nagi (and others) was arrested on a variety of drug trafficking related offenses. During the investigation, agents used wiretapping to intercept calls for some months and used the information in the prosecution of the case. Nagi and his fellow defendants were convicted and appealed.

ISSUE: Must wiretap requests prove that other methods would be ineffective?

HOLDING: No

DISCUSSION: Nagi argued that the wiretaps "did not meet the necessity requirements of 18 U.S.C. 2518(1)(c)" because they "did not establish that less intrusive techniques were insufficient to meet law enforcement needs." However, the Court agreed, "law enforcement officials are required only to 'give serious consideration to the non-wiretap techniques prior to applying for wiretap authority' and inform the court of the reasons for their belief that non-wiretap techniques 'have been or will likely be inadequate.'"[111] The Court noted that the initial affidavit detailed the reasons why the officers believed a wiretap was needed, in particular because "traditional surveillance techniques were hampered by counter-surveillance techniques employed by" the defendants.

The Court upheld the admission of the wiretapped evidence and affirmed the convictions of all defendants.

[111] U.S. v. Stewart, 306 F.3d 295 (6th Cir. 2002).

FIRST AMENDMENT

Speet/Sims v. Schuette, 726 F.3d 867 (6th Cir. 2013)

FACTS: From 2008-2011, Grand Rapids MI had an anti-begging ordinance. Both Speet and Sims were charged under the ordinance, both having been ticketed for holding up a sign soliciting assistance. Speet spent four days in jail as a result of a guilty plea, charges against Sims were dismissed. A month later, Sims asked a passerby for change and again, was cited. He pled guilty. The records indicated that in fact, 399 people had been arrested or cited under the ordinance.

Speet and Sims sued Schuette (the Michigan Attorney General), Grand Rapids and several officers, arguing that the statute violated the Constitution. The District Court granted them a partial summary judgment and Schuette appealed.

ISSUE: Does the First Amendment protect charitable soliciting (begging)?

HOLDING: Yes

DISCUSSION: The Court agreed that the Supreme Court has "held – repeatedly – that the First Amendment protects charitable solicitation performed by organizations" under the First Amendment.[112] The Court further agreed that "solicitation is a recognized form of speech protected by the First Amendment.'[113] Sister circuits had consistently ruled that individual panhandling is protected speech, as well, and there was no "'legally justificable distinction' between 'begging for one's self and solicitation by organized charities.'" The Court noted that a number of the individuals cited under the law were simply holding up signs, the remainder were verbally soliciting alms.

The Court affirmed the decision that indicated that the law violated the First Amendment in that it banned a "substantial amount of activity that the First Amendment protects."

MISCELLANEOUS – RICO

U.S. v. Adams (and others), 722 F.3d 788 (6th Cir. 2013)

FACTS: Eight people were charged in Clay County for their participation in a vote-buying scheme that went on over three elections (2002, 2004, 2006). These individuals hauled voters to the polls and then ensured that they voted for a particular slate of candidates. Once that was done, the voter received a ticket and were paid at a location away from the polls. They also worked as "voter assistants" and also with people voting by absentee. They went so far as to steal votes in those locations that were voting electronically. Members of the Board of Elections was also alleged to be part of the conspiracy.

[112] City of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).
[113] U.S. v Kokinda, 497 U.S. 720 (1990).

All of the conspirators were charged and convicted under RICO as well as money laundering and related charges. They appealed.

ISSUE: Is vote buying bribery in Kentucky?

HOLDING: Yes

DISCUSSION: First, the defendants claimed that vote buying (KRS 119.205) was not bribery and thus couldn't be considered a racketeering activity for the purposes of RICO. The Court recognized the difficulty of classifying a particular state law, particularly when the statute doesn't mention the word "bribery" – but looked to the Model Penal Code and other states to rule that in fact, it was bribery. Further, RICO is intended to be liberally construed to serve the goal of eradicating organized crime. In addition, despite the fact that there were different factions and antagonism within the group, it was appropriate for the jury to find them all involved in a single conspiracy with a common goal.

The Court also agreed that certain background evidence was admissible under FRE 404(B) – evidence that some members of the conspiracy were involved in earlier uncharged instances of vote buying – because of its similarity to the charged crime. Two of the individuals were considered "political bosses" in the county and the prior instances demonstrated their knowledge of how to commit the crime as well as their personal relationship. However, the Court disagreed that evidence that some of the defendants were involved in drug trafficking, to prove where the cash used in vote buying originated, was improperly admitted as the connection was weak.

In addition, the Court looked at the admission of an "Inside Edition" video in which Maricle was quoted extensively about election fraud, and where, it was alleged, the former Sheriff (Sizemore) was defeated because of his aggressive enforcement against marijuana growers. However, the Court noted, the video also addressed the issue of drug dealing in the county and Maricle's possible connection to it. As such, admitting the video was improper.

Two instances of witness intimidation were also addressed, a threat via MySpace and the burning of a mobile home – but the Court did not agree that a sufficient connection had been made to admit that evidence.

The defendants also objected to the admission of audio recordings made between two witnesses and defendants. The recordings were "replete with inaudible portions, barely intelligible portions, and unidentified speakers." However, the Court agreed that the recordings were sufficient to justify admission. With respect to a transcript, allegedly inaccurate, which was reviewed and amended by the Court, the defense argued that the judge was not allowed to make any substantive changes, and in this case, it was agreed that as much as ten percent of the changes made by the judge were substantive. The

Court agreed that the Court's effort (while commendable) was improper in that it did not delete portions of the transcript where the recording was unintelligible or inaudible.

Finally, the defendants argue that certain information was admitted in violation of the Confrontation Clause. The government, however, responded that their "awareness of election irregularities" – was relevant for non-hearsay purposes, such as corroboration. However, some of the evidence from complaints made to the state was unduly prejudicial and should have been excluded under FRE 403.

The court agreed that overall, the errors were not harmless and a new trial was appropriate.

MISCELLANEOUS – STATEMENTS BY A LAW ENFORCEMENT OFFICER

Wood v. Cocke County (TN) , 2013 WL 5452160 (6th Cir. 2013)

FACTS: The Woods and the Blasks owned home in Valley View Estates. The developer, Bryant, was to maintain the roads until they were accepted by the county, which has never occurred. (Bryant was imprisoned in 2010.) The county refused to accept the roads due to concerns about their current condition and the need to bring them up to standards.

In 2010 a "handful of logging trucks" used the roads, rutting and degrading them. At one point, a resident complained to a deputy sheriff that the trucks were trespassing. The deputy "responded – incorrectly – that the roads were public and therefore open to the loggers." The roads continued to degrade and the residents could not afford to approved them to the needed standard. Instead they filed suit against the county, arguing it had "implicitly accepted the roads." The trial court ruled in favor of the county and the residents appealed.

ISSUE: May an officer's statements in an unrelated matter be possible used as evidence in a case?

HOLDING: Yes

DISCUSSON: The Court looked to whether the use of the roads by emergency responders and the truckers made them public. The Court noted that on one occasion, when the deputy refused to exclude the trucks, he was mistaken in his belief, but indicated that "nobody from the subdivision ever disputed the deputy's assertion or otherwise followed up with other county officials." In any event, that mistake "did not give rise to 'a general and long-continued' public use" of the roads.

The Court upheld the trial court's decision.